DELIMITING THE TERRITORIAL SEAS OF ISLAND STATES: AN ANALYSIS OF THE ARCHIPELAGO CONCEPT UNDER PUBLIC INTERNATIONAL LAW.

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Table of Contents

CHAPTER I

INTRODUCTION

The law of the sea, as it has developed through the centuries, is best characterized, not as a mere static body of absolute prescriptions, but more appropriately as a living, growing system of customary law, the roots of which are grounded in the claims, practices and sanctioning expectations of individual states. The regime governing the seas is, therefore, highly changeable, being subject to constant shifts in the demands and expectations of states as affected by the imperatives of developing social, economic, technological and other interests and conditions. In practice, the seas are governed by a continuing process of interaction in which states assert diverse and often conflicting unilateral claims to competence over and use of the seas, which are weighed and evaluated along with competing claims by other states and international bodies, and ultimately accepted or rejected.[1]

Historically, the main function of the law of the sea has been to achieve a reasonable balance in this process of interaction between the exclusive demands, claims and interests of the various states, and the more general inclusive demands and interests of all of the states in the world community. The policy of the law of the sea, therefore, is one of establishing and maintaining public

order through shared use of, as well as shared competence over, the oceans, and by striking a reasonable balance of the inclusive interests of all states as against the special, exclusive interests of individual states, in order to achieve the greatest production of values for all.[2]

Until relatively recent times, states indicated recognition of their common interest in shared use and competence over the seas by claiming only a relatively narrow strip of territorial sea over which comprehensive exclusive authority was exercised and honored, while the world community, for its part, sought to establish an appropriate balance of interests by honoring such restrained claims. The result of this accomodation was to protect the legitimate exclusive interests of the coastal state, such as authority to control or deny passage, jurisdiction over vessels and events occurring on board, regulation of navigation and authority to exclude foreigners from fishing. At the same time, with regard to more inclusive interests, the acceptance of a narrow territorial sea by the world community left the vast areas beyond the immediate coastal strip open to all for purposes of transportation, communication, research and fishing. The success and viability of the traditional regime arising out of this delicate balancing of interests is demonstrated not only by its contribution toward the effective production and

wide sharing of values, but, more importantly, by its development into a presumption favoring inclusive claims to the widest possible productive access to the oceans. The viability of the traditional regime based on this presumption was such that not until very recently did states begin to assert territorial sea claims significantly wider than the time-honored three-mile breadth.[3]

Today, unilateral territorial sea claims, often to vast areas of what was formerly high seas, based primarily on exclusive national interests, are encroaching significantly upon the traditional community policy of maintaining the seas as a common resource available to all for the peaceful purposes of transportation, communication and exploitation of resources.[4] The most expansive such claims, those of certain Latin American states claiming 200-mile margins, are so well known as to require no more than a passing mention. Less well known, but equally expansive, are claims asserted by states with regard to delimitation of the territorial seas of island groups and the attendant implications of such claims to the maintenance of an effective system of public order for the oceans.

In this regard, the difficult question arises as to groups of islands of whether their territorial seas should be measured from the coast of each individual island or by application of a method whereby the territorial sea is to

be regarded as relating to the group as a unit or a whole, and, therefore, measured from a system of baselines connecting the outermost islands of the group.

The problem of delimiting the marginal seas of groups of islands, or archipelagos, in common with the general problem of delimiting the territorial sea, is affected by a number of factors including a lack of generally accepted limits for the breadth of the territorial sea; a lack of well-developed and universally accepted delimitation techniques and principles; the tendency of states to act with regard to their national interests with a view toward preserving and promoting their own exclusive economic, political and security goals; and the essentially unilateral character of the act of delimitation due to its dependence on the geographical, historical and economic circumstances of each state.[5]

An archipelago is, perhaps, most simply defined as a formation of two or more islands, islets or rocks which geographically may be considered as a whole. The matter becomes more complex, however, when one considers the possible variations in geographical characteristics of archipelagos. Such variations include number and size of the component islands; size and position of the group itself; compactness or wide dispersion of the group, etc. Essentially, however, for the purposes of this study,

archipelagos may be divided into two basic types, namely: coastal and outlying (or mid-ocean). The former category consists of those groups situated so closely to a mainland coast as to reasonably be considered a part thereof, while the latter comprises those groups situated in the ocean at such a distance from the mainland as to be considered independent units rather than as forming a part of the mainland.[6] This study will focus on this second category with emphasis on an appraisal of the territorial sea claims of archipelagic states, such as the Philippines, Indonesia and the Republic of Maldives.

CHAPTER II

PRINCIPLES OF INTERNATIONAL LAW RELATING TO THE DELIMITATION OF THE TERRITORIAL WATERS OF ISLAND GROUPS

Writings of International Law Publicists

For the most part, international law publicists in treating the specific problem of the territorial waters of archipelagos have done so only incidentally to discussions of the overall topic of the extent and delimitation of territorial waters. In general, however, where they address themselves directly to archipelago problems, the tendency has been to regard island groups as units with ensuing legal implications, as will become apparent in this study, favorable to the claims of archipelagic states.

Thus, Colombos states in broad terms that:

> "The generally recognized rule appears to be that a group of islands forming part of an archipelago should be considered as a unit and the extent of territorial waters measured from the centre of the archipelago. In the case of isolated or widely scattered groups of islands, not constituting an archipelago, the better view seems to be that each island will have its own territorial waters, thus excluding a single belt for the whole group. Whether a group of islands forms an archipelago or not is determined by geographical conditions, but it also depends in some cases on historical or prescriptive grounds."[7]

Jessup is in fundamental accord with the foregoing view. The rule adopted in his treatise, The Law of Territorial Waters and Maritime Jurisdiction, is as follows:

> "In the case of archipelagos the constituent islands are considered as forming a unit and the extent of territorial waters is measured from the islands farthest from the center of the archipelago."[8]

Schwarzenberger likewise states that "if islands form an archipelago, they may in certain circumstances be regarded as a unit in law."[9]

Reasoning in a more cautious vein, and primarily from the standpoint of coastal groups, Hyde appears to hold that archipelagos may legally be regarded as units. In his work, International Law Chiefly as Interpreted and Applied by the United States, he states:

> "Where, however, a group of islands forms a fringe or cluster along the ocean front of a maritime State it may be doubted whether there is evidence of any rule of international law that obliges such State invariably to limit or measure its claim to waters around them by the exact distance which separates the several units."[10]

Writing shortly after the Hague Codification Conference of 1930, the French jurist, Gidel, adopted somewhat of a compromise between the traditional and unitary views, stating:

> "In the case of an archipelago situated at a distance from the coast (an oceanic archipelago), the delimitation of the territorial sea shall be made in conformity with the ordinary rules, that is around each island individually, reserving from the operation of this rule any derogations that may result from application of the theory of historic waters. No more need be done to eliminate high seas zones enclosed between the territorial seas of the islands in the group than to apply by analogy the ten mile closing line rule applicable to bays. The elimination of high seas may not be accomplished except by their transformation into territorial seas, and not into internal waters, thereby according to foreign vessels the right of innocent passage."[11]

While recognizing that little attention had been paid to the problem by the various learned authors who touched upon it in their treatises, Philippine and Indonesian legal scholars, such as Coquia and Syatauw, nevertheless rely to some extent upon their view that archipelagos may be treated as units for support of their nation's claims.[12]

Conventional Law -- Attempts at Codification

The Hague Codification Conference of 1930

Although the question was addressed at meetings of various learned international legal societies in preceding years, the question of the delimitation of the territorial waters of archipelagos received its first thorough examination at the Hague Codification Conference of 1930.[13] To aid in the conduct of the conference's preliminary work, the

preparatory committee submitted a schedule of points, in effect a questionnaire, to participating governments soliciting their positions on various aspects of the law concerning territorial waters. The schedule of points covered a wide range of topics including the nature and content of the rights possessed by a state over its territorial waters; application of coastal state rights to the air space above and the sea bottom and subsoil beneath territorial waters; determination of baselines; straits; innocent passage; hot pursuit; as well as the question of territorial waters around islands. The latter question was phrased: "A group of islands; how near must islands be to one another to cause the whole group to possess a single belt of territorial waters?"[14]

As might be expected, there was much diversity in the replies received. The British, with whom Australia and South Africa, as well as other states, concurred, replied in the following terms:

> "In the case of a group of islands, each island will possess its own belt of territorial waters whatever the distance between the islands, there will not be a single belt for the whole group."[15]

Japan's reply agreed with the British view in general, but added the proviso that: "if, however, the distance between no two adjacent islands among the outlying islands

of the group exceeds ten nautical miles, the whole group may be considered as a single entity, the width of the territorial waters being measured outwards from the outlying islands of the group."[16]

On the other hand, Finland,[17] Norway,[18] and Sweden,[19] perhaps because of their peculiar geography, in their replies tended to favor the position of regarding archipelagos as units.

In analyzing the various replies, the preparatory committee observed that the unitary concept raised the following questions:

(a) What is the greatest permissible distance between the islands at the circumference of the group?

(b) What, if any, maximum permissible distance is there between islands within the group, even in cases where the distance between islands at the circumference is not in excess of the maximum permissible distance?

(c) What is the legal status of the waters between the islands?[20]

As will become apparent in this study, these three questions remain unanswered to this day and are still among the principal components of the archipelago problem.

The diversity of views that predominated during the preparatory stages of the conference also reflected three main currents of opinion among the states represented: (a) delimitation of a single belt of territorial seas around a

group of islands is permissible only if the component islands are not farther apart than a certain maximum distance; (b) both coastal and outlying archipelagos must be considered as units, regardless of the distance between component islands; and (c) the regime suggested under (b) above, with the added proviso that it apply only where warranted by geographical peculiarities. Of course, parallel with all of these views ran the connected question of whether waters enclosed within the archipelago should be regarded as internal waters or as territorial seas.[21] The preparatory committee attempted to answer the questions it had deduced from the various governmental positions, as well as to effect a compromise among the various opinions put forward, in the following proposed rule, submitted as Basis of Discussion No. 13:

> "In the case of a group of islands which belong to a single State and at the circumference of the group are not separated from one another by more than twice the breadth of territorial waters, the belt of territorial waters shall be measured from the outermost islands of the group. Waters included within the group shall be territorial waters."
>
> "The same rule shall apply as regards islands which lie at a distance from the mainland not greater than twice the breadth of territorial waters."[22]

The committee, thus, proposed considering archipelagos as units, but in reply to the first question, laid down a distance of twice the breadth of the territorial sea as the

maximum distance between islands at the circumference. The proposed rule's silence on the second question may perhaps be taken as an indication that no maximum distance between internal islands was intended. As to the third query, the Committee plainly wished the regime of the territorial seas to govern enclosed waters.

At the Conference proper, very little was achieved in the way of concrete results on the topic of archipelagos. The subcommittee to which the question was referred was unable to reach agreement on a definitive rule, giving as its excuse a lack of sufficient technical information. It is interesting to note, however, that in the preliminary discussions of the problem, no distinction was made between the rules applicable to coastal as opposed to outlying or mid-ocean archipelagos, even though it was recognized that geographical conditions varied considerably between the two categories of island groups.[23]

The International Law Commission

In 1952, when Professor Francois, as Special Rapporteur of the International Law Commission on the Law of Sea, submitted his first report on the regime of the territorial sea, he devoted a special rule to the question of groups of islands. This rule, Article 10 of his first draft,[24] applied without distinction to "groups of islands" (archipelagos) and "Islands situated along the coast." As

to both categories, the draft article provided that baselines not greater than ten miles in length might be adopted for measuring the territorial sea in the direction of the high seas. It was also stipulated that waters included in the group should constitute internal waters.

There was some overlapping between this proposed article and Article 5 of the draft, which, on the basis of the decision of the International Court of Justice in the Anglo-Norwegian Fisheries Case, provided for application of straight baselines where "...a coast is deeply carved with indentations and cuts, or bordered by an archipelago."[25]

Professor Francois, in his second report, clarified the relationship between the initial drafts of Articles 5 and 10 by modifying Article 10 so as to apply to "groups of islands stretching along a coast." The provision for ten-mile baselines was retained, but mention of the character of enclosed waters as internal was omitted.[26]

Article 12(1) of Professor Francois' third report, the final wording considered by the Commission, first defined the phrase "group of islands" to mean three or more islands, provided they enclose a portion of the sea when joined by straight baselines not exceeding five miles in length, except that one such line might extend to a maximum of ten miles.[27] Paragraph 2 of draft Article 12 provided that the baselines between islands should be used for measuring the territorial sea and that the waters lying within the area bounded by

these lines should be considered as internal waters. The five-mile limitation on baselines had the effect of limiting considerably the number of cases in which the straight baseline method could be applied to archipelagos. The concession of allowing one ten-mile baseline was apparently an attempt, according to Professor Sorenson, to assimilate the waters enclosed by a group of islands to the rule laid down in draft Article 9 providing for a ten-mile closing line for bays. Again, draft Article 12 contained no provision concerning a maximum permissible distance between islands within the group, and, therefore, no limitation as to areas of water which might be enclosed within the baselines.[28]

In June 1955, draft Article 12, now styled as provisional Article 11, was considered by the Commission. Professor Francois explained to the Commission that the five-mile maximum distance between islands was necessary in order to safeguard the freedom of the seas and to prevent large areas of the high seas from becoming enclosed as internal waters. He suggested, however, that, by analogy to the Commission's decision relative to the closing lines of bays, the maximum length of the one long line be increased to 25 miles.[29]

Mr. Garcia Amador of Cuba expressed himself as being in basic agreement with Professor Francois' text of Article 11, but proposed omission of any maximum length limitations on baselines, since the Commission had not imposed these

in provisional Article 5 dealing with coastal archipelagos.[30] Sir Gerald Fitzmaurice, on the other hand, maintained that some limit was necessary, inasmuch as the whole idea of having a special provision for groups of islands was to allow enclosed waters to be regarded as internal waters, and, consequently, the islands should be reasonably close to one another.[31] There being considerable divergence of views as to the implications of the provisional article for different types of archipelagos, it was agreed to delete it altogether.[32]

The question arose again, however, at the next, the eighth, session of the International Law Commission in 1956 when the government of the Philippines, in its observations on the draft articles, expressed the opinion that special provisions should be made to take into account the archipelagic nature of certain states such as the Philippines.[33] This caused some controversy; however, the Commission did not go any further into the matter, but confined itself to inserting a commentary into its report to the General Assembly calling attention to the problem, pointing out the lack of technical information on the subject and expressing the hope that if an international conference were to subsequently study the proposed rules it would give attention to the problem of groups of islands.[34]

The Geneva Conference and the Convention on the Territorial Sea and the Contiguous Zone

The rule contained in Article 10, as adopted by the International Law Commission at its eighth session, reads, in pertinent part: "Every island has its own territorial sea."[35] As mentioned above, however, the commentary of the Commission[36] made it perfectly clear that this provision was not intended to settle the difficult problem of archipelagos for all time. Unfortunately, this was not to be the case, as the Geneva Conference followed the proposals regarding coastal archipelagos, while ignoring altogether the question of outlying or mid-ocean island groups. Thus Article 4 (1) of the Convention reads:

> "In localities where the coast line is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baselines from which the breadth of the territorial sea is measured."[37]

Needless to say, the problem was very much in evidence at the Conference; however, again nothing concrete in the way of solutions was forthcoming. The question was studied in a preparatory document, drafted at the request of the United Nations Secretariat by the Norwegian jurist, Jens Evensen.[38] He, essentially, concluded that in many cases it would be only natural and practical to treat outlying groups of islands as a whole by drawing straight

baselines between their outermost points. Such a dispensation, however, would depend, according to Evensen, to a large extent upon the geographical features of the archipelago concerned. He, therefore, proposed a rule on outlying archipelagos to the effect that, if a group of islands belonging to a single state may reasonably be considered as a whole, straight baselines, as provided for by Article 4 of the Convention on the Territorial Seas, may be applied for the delimitation of the territorial seas. Enclosed areas would be considered as inland waters, but would remain open to innocent passage of foreign vessels where they form straits.

During the course of the debate at the Conference, the representative of the Philippines argued that compact, outlying archipelagos should be treated as a whole, with the waters lying between and within the islands of the group considered as internal, and that such groups should be surrounded by a single belt of territorial sea.[39] The Indonesian delegate also expressed the opinion that an archipelago should be regarded as a single unit, the territorial sea of which should be measured from baselines drawn along the outermost points of the outermost islands. He stressed the vital importance which security of communications represents to the archipelagic state, particularly in times of national emergency. Indonesia's representative

also expressed regret that the International Law Commission had been unable to agree upon a definitive rule governing mid-ocean archipelagos and suggested that a subcommittee be established to deal with the problem.[40]

Two delegations submitted formal proposals concerning the regime for outlying groups of islands. The Yugoslavian proposal[41] was premised upon amendment of draft Article 10 governing islands, while the Philippine proposal[42] approached the problem from the standpoint of adding new language to the existing wording of draft Article 5 on straight baselines, or, in the alternative, amending Article 10 concerning islands. The two proposals had several points in common. Each provided for use of straight baselines drawn along the coast of the outermost islands and provided that waters within the baselines should be considered as internal. The Philippine proposal, in addition, required that the islands should be sufficiently close together to form a compact whole, that they should have historically been considered collectively as a single unit, and that the baselines should follow the general configuration of the group.

Neither of these proposals came to a vote.[43] Thus, today the closest thing to a regime covering mid-ocean archipelagos is to be found in Articles 4(1) and 10(2) of the Convention. However, it is clear from the wording of

the former Article that it does not apply to groups of islands which do not satisfy the geographical criteria laid down therein, especially that portion referring to "...islands along the coast in its immediate vicinity...", while the latter cannot be considered controlling as it entirely ignores the problem. Mid-ocean archipelagos are, therefore, plainly not covered by these or any other articles of the Convention on the Territorial Sea and it remains an open question juridically as to how the territorial sea is to be measured in the case of such island groups.[44]

Judicial Precedent---The Judgment of the International Court of Justice in the Anglo-Norwegian Fisheries Case

One can readily see from the foregoing that very little in the way of guidance as to governing principles of international law concerning the territorial seas of outlying archipelagos can be derived from the writings of the publicists, the work of international law conferences, or existing conventional law. A more fruitful source of guidance does exist, however, namely, the decision of the International Court of Justice in the Anglo-Norwegian Fisheries Case,[45] which will now be examined.

The United Kingdom instituted the Fisheries Case against Norway in 1949 objecting to the Norwegian delimitation of her northern territorial waters as a result of a

number of British trawlers being arrested and condemned by Norwegian authorities for violations of Norwegian fisheries zones. At issue, basically, was the validity under international law of the Norwegian delimitation system, established by a Royal Decree of 12 July 1935, as amended by a Decree of 10 December 1937, by which a series of straight baselines was laid down along the seaward projections of the outermost components of the Norwegian coastal archipelago---the skjaergaard. Pursuant to these decrees baselines were drawn connecting 48 points, all varying in length, but with at least 11 exceeding 18 miles in length, and one as long as 44 miles. In one case, the baseline was drawn to a rock exposed at low tide.[46]

At the outset, it is important to note that the four-mile width of the territorial sea claimed by Norway was not at issue, in fact, the Norwegian claim in this regard was conceded by the United Kingdom during the proceedings.[47] Also, although the 1935 decree referred in specific terms to fisheries zones only, the Court had no doubt that it delimited what Norway conceived to be her territorial sea.[48]

In summary, the principal legal issues raised by the United Kingdom were that international law does not permit individual states to arbitrarily choose the baselines for their territorial waters; that territorial waters are to be measured from the actual coastlines, that is, from

the low-water mark on permanently dry land; and that departures from the latter principles are strictly limited by international law.[49] In opposition, Norway contended that no general rule existed in international law requiring baselines to follow the coast throughout, and that, even if such a rule did exist, it was not binding on Norway since she had consistently refused to accept it, and finally, that international law did not prohibit a state from drawing straight baselines delimiting its territorial waters from headland to headland.[50]

The International Court's judgment, by a vote of 10 to 2, upheld the Norwegian straight baseline method on the ground that it was part of a traditional system which had been applied by Norway without protest to parts of her coast since as early as 1812, and that this system was, therefore, entitled to "...the benefit of general toleration."[51]

That part of the Court's decision most material to this study concerns itself with the locus of the problem. In dealing with Norway's peculiar geographical problems in delimiting her territorial seas, the Court stated:

> "Where the coast is deeply indented and cut into, as is that of Eastern Finmark, or where it is bordered by an archipelago such as the skjaergaard along the western sector of the coast here in question, the baseline becomes independent of the low-water mark, and can only be determined by means of a

> geometric construction. In such circumstances the line of the low-water mark can no longer be put forward as a rule requiring the coast line to be followed in all its sinuosities. Nor can one characterize as exceptions to the rule the very many derogations which would be necessitated by such a rugged coast; the rule would disappear under the exceptions. Such a coast, viewed as a whole, calls for the application of a different method, that is, the method of baselines which, within reasonable limits, may depart from the physical line of the coast."[52]

The foregoing rule was, however, carefully circumscribed by the Court. Noting, in this connection, the basic considerations inherent in the nature of the territorial sea, the Court enunciated a number of criteria to be used in applying straight baselines. Chief among these were the following:

(1) "...the drawing of baselines must not depart to any appreciable extent from the general direction of the coast."

(2) "The real question raised in the choice of baselines is in effect whether certain sea areas lying within these lines are sufficiently closely linked to the land domain as to be subject to the regime of internal waters."

(3) "...there is one consideration not to be overlooked--that of certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by long usage."[53]

Above all, the Court stressed throughout its decision the importance of the exceptional geography of

the Norwegian coast. In this regard it stated: "Since the mainland is bordered in its western sector by the skjaergaard, which constitutes a whole with the mainland, it is the outer line of the skjaergaard which must be taken into account in delimiting the belt of Norwegian territorial waters. This solution is dictated by geographical realities."[54]

Can these principles laid down by the Court in the Fisheries Case be applied by analogy to outlying or mid-ocean archipelagos, which in many respects, with the obvious exception of the element of a continental mainland, present geographical characteristics strikingly similar to those considered by the Court in connection with its decision. Although admitting that the decision in the Fisheries Case is not binding, under Article 59 of the Statute of the International Court of Justice, on other states, and that the specific facts of a particular case before the Court will always weigh heavily in its final decision, Mr. Evensen, in his article,[55] expressed the view that the International Court in its decision had spoken on broad principles of international law applicable to the problem of outlying archipelagos. Professor Sorenson,[56] on the other hand, is of the opinion that the Fisheries decision had the practical effect of separating the problem of coastal archipelagos from that of outlying or mid-ocean groups. What had formerly been a controversial issue of international law was, in his opinion, now decided by the

Fisheries Case, but only as to groups of islands in close proximity to the mainland. He points out that, although the Court referred to "groups of islands or coastal archipelagos" in very broad terms when it refuted the British position, the geographical criteria, upon which it relied in recognizing that a system of straight baselines could be applied, were such that mid-ocean archipelagos could hardly have been contemplated. As an example of this, Professor Sorensen cites the condition laid down by the Court stipulating that baselines "...must not depart to any appreciable extent from the general direction of the coast," and concludes that this criterion obviously is inapplicable to groups of islands located at some distance from the mainland.

The views of both jurists are clearly worthy of great weight, as neither can be said to be entirely wrong in his conclusions. Certainly, if not directly dispositive of the issue, the Fisheries Case reasoning is most persuasive as a source of authority for scholars evaluating the territorial sea claims of island states. In this regard, Professors McDougal and Burke, writing in their treatise, Public Order of the Oceans, appear to be of the opinion that the decision is fundamentally relevant to all straight baseline problems, although obviously aimed with particular emphasis at those of islands near a coast.[57]

CHAPTER III

STATE PRACTICE -- CLAIMS AND COUNTERCLAIMS

Claims Respecting the Territorial Seas of Coastal Archipelagos and Dependent Outlying Island Groups

A number of states, in some cases long before the decision in the Fisheries Case, asserted the validity of the straight baseline method of delimiting their respective territorial waters by means of unilateral state acts. As indicated in the Evensen study of 1958, the nations of Iceland, Denmark, Sweden, Finland, Yugoslavia, Saudi Arabia, Egypt and Cuba employed straight baselines drawn along the outermost points of their archipelagic coasts with the waters enclosed within such lines considered as internal waters.[58] This practice, largely as a result of the holding in the Fisheries Case, was ultimately codified in the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone under Article 4(1).

On the other hand, Mr. Evensen's study also notes that a number of the leading maritime nations, including the United Kingdom and the United States, are opposed to this practice.[59] Britain has, for the most part, maintained a rather strict posture with respect to delimiting the territorial seas of her various insular dependencies, insisting that each island should have its own territorial

waters.[60] Jamaica offers the sole exception to this otherwise strictly applied policy. With respect to Jamaican waters, in 1864 the Law Officers of the Crown held that:

> "...in places where the possession of particular rocks, reefs or banks, naturally connected with the mainland of any part of Her Majesty's territories, is necessary for the safe occupation and defense of such mainland, Her Majesty's Government also claim the waters enclosed between the mainland and those rocks, reefs or banks; whatsoever may be the distance between them and the nearest headland."[61]

In line with the British, the United States has been one of the leading proponents of the theory that archipelagos, whether coastal or outlying, cannot be treated in any different way from isolated islands as far as the delimitation of territorial waters is concerned. In the United States view, islands have their own territorial seas, which may or may not coalesce with the territorial seas of the mainland or neighboring islands.[62] Thus, with regard to its insular territories, including the most important, the State of Hawaii, the United States has refrained from applying the archipelago concept of delimitation, preferring instead to measure the territorial sea of its archipelagos in the traditional fashion, from the low-water mark on the coast of each island. This principle was affirmed with respect to Hawaii in 1965 by the United States Court of Appeals for the Ninth Circuit

in its opinion in the case of Island Airlines, Inc. v. Civil Aeronautics Board, in which it held that the Board was entitled to an injunction against an airline flying between the various Hawaiian Islands without the benefit of a Board certificate of public convenience and necessity normally required for operation of an air carrier engaged in interstate commerce. The Court refuted the airline's contention that its flights between the various islands were in reality intrastate flights because the channels separating the islands are within the boundaries of the State and constitute, therefore, territorial waters. It found that neither Hawaii, as a monarchy, republic or state, nor the United States had ever claimed the channel waters as historic waters, and ruled that the airline's operations were such that the aircraft, under the prevailing regime of United States territorial waters, would have to fly over the high seas between islands, thus falling within the regulatory power of the Civil Aeronautics Board.[63]

Claims of Archipelagic States

The Philippines

The Philippines was the first of the truly archipelagic states to assert a comprehensive claim to competence over the seas between and surrounding its component islands. This was done initially in a note dated 12 December 1955

from the Philippine Ministry of Foreign Affairs to the Secretary General of the United Nations announcing that:

> "The position of the Philippine Government in the matter is that all waters around, between and connecting the different islands belonging to the Philippine Archipelago irrespective of their widths or dimensions, are necessary appurtenances of its land territory, forming an integral part of the national or inland waters, subject to the exclusive sovereignty of the Philippines. All other water areas embraced in the imaginary lines described in the Treaty of Paris of December 10, 1898..., the treaty concluded at Washington, D. C., between the United States and Spain on November 7, 1900..., and the Agreement of January 2, 1930 between the United States and the United Kingdom..., and the Convention of July 6, 1932 between the United States and Great Britain..., as reproduced in Section 6 of Act No. 4003 and Article I of the Philippine Constitution, are considered as maritime territorial waters of the Philippines for the purposes of protection of our fishing rights, conservation of our fishing resources, enforcement of revenue and anti-smuggling laws, defense and security, etc."
>
> "It is the view of our Government that there is no rule of international law which defines or regulates the extent of the inland waters of a State."[64]

During the eighth session of the International Law Commission's conference on the regime of the territorial sea, the Philippines reiterated its position in another note verbale dated 20 January 1956 to the Secretary General. This note was identical in language to that of 12 December 1955, with the exception of the following additional proviso:

> "...and protection of such other interests as the Philippines may deem vital to its national welfare and security, without prejudice to the exercise by friendly foreign vessels of the right of innocent passage over those waters. All natural deposits or occurrences of petroleum or natural gas in public and/or private lands within the territorial waters or on the continental shelf, or its analogue in an archipelago, seaward from the shores of the Philippines, which are not within the territories of other countries, belong inalienably and imprescriptibly to the Philippines, subject to the right of innocent passage of ships of friendly foreign States over those waters."[65]

This sweeping claim covers vast areas of the western Pacific and of the South China Sea in addition to numerous lesser bodies of water more or less surrounded by the Philippine Islands. The largest of these enclosed waters, the Sulu Sea, covers an area of 86,000 square miles.[66] (For a graphic illustration of the scope of the Philippine claim, see Appendix A)

During the Second United Nations Conference on the Law of the Sea, the chief of the Philippine delegation, Mr. Arturo Tolentino, in a statement[67] to the assembled delegates, explained the juridical and historical bases of his government's claim. He pointed out that the Treaty of Paris of 10 December 1989, whereby the Philippines was ceded by Spain to the United States, spoke not only in terms of the archipelago known as the Philippine Islands, but, more importantly, in terms of certain metes and bounds indicating

by longitude and latitude the boundaries of the territory ceded. Mr. Tolentino stressed also that this method of delimiting the Philippine archipelago was also employed by Spain and the United States in a supplementary treaty of cession in 1900, and in 1930 in a treaty between the United States and the United Kingdom concerning the boundary between the Philippines and North Borneo.[68] Finally he pointed out that the Philippine Constitution of 8 February 1935, as amended,[69] in Article I specifically defines the national territory of the Philippines by reference to the aforementioned treaties. The absence of any protest by other nations against the exercise of sovereignty, first by the United States, then by the Philippines, over the territory embraced by these various treaties and the Philippine Constitution operated, in Mr. Tolentino's view, to give the Philippines both a legal and historic basis for its claim. By way of further argument in support of his nation's claim, Mr. Tolentino declared that due to considerations of geography and economics, all of the waters of the Philippine archipelago, regardless of their width or dimensions, have always been regarded as necessary appurtenances of the land territory, forming part of the inland waters of the Philippines. The largest of these inland waters, the Sulu Sea with a total surface area of about 86,000 square miles, he noted was insignificant as compared, for example, to Hudson Bay with its 500,000 square miles, which Canada

claims as part of its national waters under historic title.[70]

The Congress of the Philippines eventually formalized the nation's claim by enacting Republic Act 3046 of June 17, 1961,[71] which provides for a system of straight baselines joining appropriate points on the outermost islands of the group. The waters enclosed within these baselines, covering an area of 328,345 square miles,[72] are considered internal, while those beyond the baselines, but within the limits of the boundaries established by treaty, covering an additional 258,515 square miles,[73] are considered as territorial waters. Simple arithmatic shows, therefore, that, by virtue of her claim, the Philippines, which possesses 115,600 square miles of land territory, has increased her total area to 702,460 square miles, or by more than a factor of six.

Indonesia

The government of Indonesia was not long in following the Philippine example. In fact, its claim clearly resembles that of the Philippines, and the use of identical terms in its assertion is striking. On 14 December 1957, it issued a declaration concerning the territorial waters of the Indonesian Republic, which, in pertinent part, stated:

> "Historically, the Indonesian archipelago has been an entity since time immemorial. In view of territorial entirety and of preserving the wealth of the Indonesian state, it is deemed necessary to consider

> all waters between the islands an entire entity. On the ground of the above considerations, the Government states that all waters around, between and connecting the islands or parts of islands belonging to the Indonesian archipelago irrespective of their width or dimension are natural appurtenances of its land territory and therefore an integral part of the inland or national waters subject to the absolute sovereignty of Indonesia. The peaceful passage of foreign vessels through these waters is guaranteed as long and insofar as it is not contrary to the sovereignty of the Indonesian state or harmful to her security. The delimitation of the territorial sea, with a width of 12 nautical miles, shall be measured from straight baselines connecting the outermost points of the islands of the Republic of Indonesia."[74]

The broad outlines of the foregoing announcement were laid down with specificity in legislation enacted in 1960.[75] In 1962, an ordinance governing peaceful passage in Indonesian waters was enacted. It basically guaranteed the right of innocent passage of foreign vessels through internal waters, which, prior to the claim announced in 1957 and the legislation of 1960, had constituted high seas or territorial waters. Bays, inlets, and estuaries of less than 24 nautical miles width are exempted. Foreign fishing vessels are required to transit internal waters along sealanes determined by the Indonesian Navy and to keep their fishing gear packed and stowed while in Indonesian territorial seas and internal waters. Foreign men of war and government vessels are required to obtain

the prior approval of the Indonesian Navy for any transit of Indonesian waters; submarines are required to sail on the surface at all times.[76]

Mr. Achmad Subardjo, chairman of the Indonesian delegation to the United Nations Conference on the Law of the Sea in 1958, spoke in defense of his country's claim during the general debate. He asserted that the traditional approach of measuring the territorial sea from the low-water mark was based on the assumption that the coastal state was continental in nature. Such a system could not be applied without harmful effects to archipelagic states. As in the case of Indonesia, consisting of some 13,000 islands scattered over a vast area, treating each island as a separate entity with its own territorial waters would create serious problems with regard to communications and the effective exercise of state jurisdiction.[77] In an explanatory memorandum accompanying the Act of 1960, the Indonesian government buttressed its claim by referring to the governmental need for homogeneity of territory for purposes of communications, jurisdiction and security. In the field of economics, the memorandum noted that the effect of the Act would be to vest Indonesia not only with sovereignty over all waters enclosed within the boundaries of the territorial sea, but over the superjacent airspace and subjacent sea-bottom and subsoil as well. The dependence

of the Indonesian populace on the sea as an important source of protein was also observed, and the protection of this resource, particularly in view of the primitive nature of the Indonesian fishing industry, was asserted as another justification for the nation's claim.[78] (For a graphic illustration of the scope of the Indonesian claim, see Appendix B)

The Maldive Islands

The most recent claim to delimitation of territorial seas by application of the archipelago concept, that of the Republic of Maldives, was largely unnoticed by the world community when initially promulgated in 1964, when the territory of the then self-governing British protectorate of the Maldives was defined in its constitution as including the islands, sea and air surrounding and in between the islands situated within certain stated coordinates.[79]

This lack of notoriety is understandable considering the relative isolation of the Maldives, lying as they do some 400 miles to the southeast of Ceylon, consisting of about 2,000 low-lying coral islands totalling about 115 square miles in area, and inhabited by only 96,432 persons.[80] However, the vast scope of the Maldivian claim was finally brought to the world's attention in 1970 when the Republic of Maldives government began, through diplomatic channels, to protest incursions into her claimed territorial

waters and exclusive fishing zone by foreign fishing vessels.[81]

At this time it was learned that contrary to the general belief that the Maldives claimed a 12-mile territorial sea drawn from the normal baselines of each island, the Republic of Maldives was in fact claiming as territorial seas an area of the Indian Ocean totalling some 37,000 square miles[82] lying between Latitudes 7° 9½' North and 0° 45¼' South, and Longitudes 72° 30½' East and 73° 48' East.[83] In addition to this expansive territorial sea claim, the Maldives in 1969 and 1970 established a fishing territory covering an additional 113,000 square nautical miles bounded by coordinates running beyond and essentially parallel to those delimiting the territorial sea.[84] (For a graphic illustration of the scope of the Maldivian claim, see Appendix C)

As is obvious from an examination of Appendix C, the territorial sea claimed by the Maldives is unique not only with regard to its disproportionate size in relation to the land area concerned, but in its utter lack of any logical relation to territorial baselines. In this respect, it is most closely related to the Philippine claim. Although the bases for the Maldivian claim have not been enunciated by the claimant, inasmuch as the economy of the Maldives is based almost exclusively on fishing, with dried bonito the main export commodity,[85] it would be safe to assume that

it is motivated primarily by a desire to prevent competition between poorly equipped Maldivian fishermen and more modern foreign fishing fleets.

The Counterclaim and Resulting Protests Against Unilateral Acts of Delimitation

Briefly put, the main response to claims to delimit the territorial sea by means of lines connecting the outermost islands of a group, thereby including all waters within such lines as internal waters, has been that islands in an archipelago are no different than other islands, therefore, each should have its own distinct belt of territorial sea. The counterclaimants deny the admissibility of applying straight baselines and designating enclosed waters as internal.[86]

The principal counterclaimants, the great maritime nations, such as Great Britain, the United States, the Netherlands, the Scandinavian countries, Australia and Japan, reacted strongly to the claims of the Philippines and Indonesia.

The United States' attitude toward the Philippine claim, insofar as it was based on treaty boundaries, was that the lines referred to in bilateral treaties between the United States and Great Britain and Spain were intended merely to delimit the region within which certain land areas were to belong to the Philippines and that they were not in any sense intended as boundary lines.

In 1958, the United States government stated that it recognized only a three-mile territorial sea for each of the Philippine islands.[87]

When the chief of the Philippine delegation to the 1960 Geneva Conference on the Law of the Sea was heard to have informed the press that failure by any country represented at the Conference, including the United States, to register protest to the Philippine position constituted tacit recognition of his country's claim,[88] the United States Department of State hastened to draw attention to pertinent parts of the address delivered to the Conference by the United States delegate, Arthur H. Dean, to the effect that "...its [the United States'] silence was not to be construed in any way as acquiescence in any views stated at the Conference which were inconsistent with the official position of the United States Government..."[89] Upon approval of Republic Act 3046 by the Philippine government on 18 May 1961, the United States registered its protest by means of an embassy note declaring, inter alia, that it could not regard as binding upon it or its nationals, any claims based upon the said Act.[90]

The Indonesian claim of 14 December 1957 evoked even swifter response from maritime states. On 31 December, the United States Embassy delivered a note of protest to the Indonesian Foreign Office.[91] The Japanese

government on 13 January 1958 likewise addressed a communication to the Indonesian government protesting that government's claim and asserting that its validity could not be admitted under established international law.[92] An announcement was issued on 15 January 1958 by the government of Australia stating that it would not recognize or be bound by Indonesia's announced claim to sovereignty over the Java Sea and its superjacent airspace.[93]

It is interesting to note that of the major maritime states, only Russia came out unequivocally in favor of the Indonesian claim which it considered to be fully in accord with the rules of international law.[94] Also of some interest is the fact that the claim of the Philippines was not received with nearly as much protest or criticism as that of Indonesia. This is, perhaps, due to the central geographical position of the Indonesian archipelago athwart sealanes that are considered to be more critical than those traversing Philippine waters.[95] The same rationale no doubt explains the relative lack of controversy over the claim of the Maldives. In any case, the United States government registered its protest to the Maldivian claim in an aide memoire forwarded by the American Embassy in Colombo, Ceylon, during the first week of June, 1970.[96]

Bases of the Counterclaim

Probably the main consideration invoked against

the application of the straight baseline system to outlying archipelagos is the legal status of the waters enclosed by such baselines. It has been generally assumed, both in practice as well as in connection with many of the proposed rules discussed, that such enclosed waters should have the status of internal waters. As the outstanding legal feature of internal waters is the complete sovereignty which a state exercises over them, in effect as complete as it may exercise over its land territory and including the right of exclusion of foreign vessels,[97] the archipelagic system of delimitation flies directly in the face of the time-honored doctrine of the freedom of the seas.

The official position of the United States is that there is no justification in international law for the application of straight baselines as advocated by the archipelagic states. Each island is considered as having its own normal baselines and, where such islands are sufficiently close together their territorial seas may coalesce and form a continuous zone of territorial waters. Otherwise, absent such coalescence, all intervening waters are to be viewed as high seas.[98]

Arthur H. Dean illustrated the position of the United States very vividly by referring to the circumnavigation of the globe by the nuclear submarine TRITON in 1960. During the course of her voyage, TRITON passed submerged through the Surigao Strait south of Luzon, the Mindanao

Sea, The Macassar Strait, the Java Sea and into the Indian Ocean. Dean pointed out that much of the waters traversed by TRITON during this part of her voyage are claimed unilaterally by the Philippines and Indonesia as internal waters, although they include vast stretches of what is high seas.[99] Thus, had the unilateral claims of Indonesia and the Philippines to the waters within the respective archipelagos as internal waters been recognized or considered as established in international law by the United States, the voyage of the TRITON would have been impossible without the prior permission of the states concerned.[100]

Speaking from the British point of view, Sir Gerald Fitzmaurice approached the problem from an appealingly simple standpoint. In his view, Paragraph 2 of Article 10 of the Convention on the Territorial Sea and the Contiguous Zone, which provides that "the territorial sea of an island is measured in accordance with the provisions of these articles,"[101] would seem to imply the fact that the Convention had resolved the question of outlying groups of islands by simply not providing any special system for delimiting the territorial seas of such groups on any "group basis." According to this provision of the Convention, in Sir Gerald's view, where there is an island group, each unit thereof has its own territorial sea measured around it in the ordinary way. Should, however, individual islands be sufficiently close together,

their territorial seas will overlap and a fairly compact stretch of water will be created constituting a sort of bloc of territorial sea. Conversely, if there is no overlap due to wide separation of the component islands, the waters between the resulting areas of territorial sea will partake of the nature of high seas. Fitzmaurice is convinced that the foregoing represents general international law as it now stands, despite the claims of the archipelagic states. As to such claims, in his view, except where the island group in question is really compact, there is the potential for great abuse, particularly where enclosed waters are deemed internal. His interpretation of the Convention, the "overlap theory," on the other hand, would obviate this difficulty, as enclosed waters would consist of territorial as opposed to internal waters.[102] This approach has the benefit of simplicity and would obviously suit both the exclusive and inclusive interests of states such as the United States, Great Britain and Japan, which lie in preservation of freedom of navigation. It has, however, been clearly rejected by the archipelago nations. The solution to the controversy, therefore, lies obviously not in pressing traditional concepts upon such nations, however inclusive in scope and effect, but in devising an accommodation that will effectively protect their legitimate special interests as well as the more general interests of other states and the community at large.

CHAPTER IV

THE CONTROVERSY IN PERSPECTIVE

The Geographical Context

The Philippines

The Philippines occupies an archipelago composed of an estimated 7,100 islands, of which about 880 are inhabited. Its total land area of 115,708 square miles is slightly smaller than that of the British Isles, however, due to its extensive fragmentation, the Philippines has a coastline nearly equal in length to that of the United States.[103] Located off the coast of Southeast Asia, the Philippines is closely related geologically to the discontinuous chain of islands stretching from Sakhalin, through Japan, Taiwan and on through the Indonesian archipelago. In fact, the Philippines shares a common continental shelf, or submarine platform, with Indonesia.[104] The dimensions of the Philippine group are imposing, extending over 1,000 miles on its north-south axis, and over 600 miles east to west.[105]

This vast expanse of island studded sea lies astride many important sealanes. Convenient east-west sea traffic is dependent upon passage through straits between certain islands of the Philippine group. Chief among these are San Bernadino Strait separating south-

eastern Luzon from northwestern Samar and forming one of the main routes between the Pacific Ocean and the China Sea,[106] and Surigao Strait separating southern Leyte from northern Mindanao and connecting the Pacific Ocean with the waters of the Mindanao, Sulu and China Seas.[107]

The Philippines also occupies a critical geographical position with respect to international air traffic. It lies at the junction of long-distance air routes connecting Asia, the United States, Australia and the Western Pacific. As a result, Manila airport has become one of the three most important in Southeast Asia.[108]

Indonesia

The territorial base of the Republic of Indonesia consists of the largest archipelago in the world.[109] In all, the country consists of some 13,000 islands totalling 736,469 square miles in surface area. The extremes of the archipelago are separated by more than 2,500 miles from east to west and 1,250 miles from north to south. Indonesia forms a discontinuous land bridge between the continents of Asia and Australia, with the major gaps between the land portions of the bridge, such as the Malacca, Sunda and Macassar Straits, connecting major east-west sealanes.[110] The strategic importance of Indonesia stems from this bridge-like morphology and the fact that it is surrounded by some of the most important

waters of Asia. The Indonesian archipelago is bordered on the east by the Pacific and in the west by the Indian Ocean. The Strait of Malacca and the South China Sea separate it in the north from the Asian mainland, while in the south the Indian Ocean and the Arafura Sea separate it from Australia. The commercial and maritime significance of Indonesia is particularly affected by the many lines of world communication that pass through its waters and become concentrated at a few important straits.[111]

The Maldive Islands

The land territory of the Republic of Maldives consists of a chain of twelve low-lying coral reefs covering a total area of 115 square miles. The chain extends 550 miles from north to south between lattitudes 7° 6' north and 0° 42' south. The nearest significant land mass is Ceylon, which lies about 450 miles to the northeast.[112]

The Maldives are probably most remarkable for their lack of notoriety. Major international sea and airlanes are far removed from the group. However, the Indian Ocean, in which the Maldives occupy a central position, has in recent years become an arena of increasing naval competition between the Soviet Union and the United States. This competition was sparked by Great Britain's decision in 1968 to relinquish its traditional role of peace-keeper in the area and to withdraw its military forces from their posi-

tions east of the Suez Canal.[113] As Britain withdrew its forces, the Soviet Union progressively expanded its naval presence in the Indian Ocean. By 1970, certain American military analysts began to regard the Soviet Navy as the paramount power in the region by virtue of its maintaining between six and fifteen warships in the area and engaging in frequent maneuvers and portcalls.[114] In December 1970, in an apparent effort to counter the growing Soviet presence, the United States and Britain announced the planned construction of a joint air and radio communications base on Diego Garcia Island in the Chagos Archipelago, which is located to the south of the Maldives, for the purpose of monitoring the activities of the Soviet Indian Ocean fleet.[115]

The Maldives are, willingly or not, caught up in this evolving international competition, not only because of their geographical location, but because of the presence on the Maldivian island of Gan of a British military airfield.[116] How this struggle will eventually affect the Maldives is difficult to say at this juncture, but it is clear that the strategic importance of the islands is bound to increase with the intensity of the competition for naval supremacy in the area.

The Historical Context

An understanding of the motivation for pressing

expansive claims as those espoused by the Philippines, Indonesia and the Maldives can only be achieved by an awareness of the historical setting in which they were made. In all three instances, unilateral acts of delimitation in accordance with the archipelago concept were closely related in time to the achievement of national independence. In the case of the Philippines, independence was won in 1946[117] and the claim followed in 1955.[118] Indonesia became a sovereign state in 1949[119] and asserted her claim in 1957.[120] The Republic of Maldives, as a self-governing British protectorate made its claim in 1964,[121] one year prior to Britain's grant of full independence.[122]

In point of time, the claims of the Philippines and Indonesia also form part of the plethora of claims typified by those of Chile, Ecuador and Peru to ever widening competence over adjacent waters that followed in the wake of the Truman Proclamation on the Continental Shelf of 1945.[123] As "new" or emerging states, therefore, it is clear that the claimants in the archipelago problem, are reluctant to accept as binding those rules of international law relating to the delimitation of islands created before they attained statehood.[124] This attitude must be taken fully into account if a regime for archipelagic waters mutually satisfactory to coastal as well as world community interests is ever to be devised.

The Exclusive Interests of the Claimants

The seas surrounding and adjacent to archipelagos provide almost laboratory conditions for observation of the competing and frequently conflicting interests of coastal as against other states. It is only natural that out of this welter of opposing demands and expectations, the most intense concentration of interests and concommitant expectations should be found in the coastal, or archipelagic state. Such coastal interests include primarily the normally accepted demands for power, encompassing factors such as access to territorial bases of power, defense, and exercise of police power in adjacent waters; for wealth, which includes control over access to and disposition of resources, as well as protection of the wealth producing processes; for well-being, under which may be enumerated resource controls, inspection procedures and sanitation and pollution controls; and for enlightenment, which covers activities such as scientific research.[125] Other base values, such as rectitude, affection, skill and respect, with the possible exception of the latter two, seem to play less of a role in the formulation of coastal interests. Respect, of course, may, to some extent, be hoped for, if not realized, in extending a

state's territorial sea domain, while skill as a value could possibly be affected in terms of improved resource exploitation and fishing technology brought about as a side effect of obtaining a monopoly in certain waters. However, considering the fact that the archipelago states share in common the status of under-developed or developing countries, it is doubtful that without outside assistance they would be capable of effective measures toward maximizing the development of skill in their adjacent seas, at least not in the forseeable future.

In a practical sense, the most relevant factor affecting the concentration of exclusive coastal interests is the geographical reality of archipelagic states being composed of a group or groups of islands separated by expanses of water of varying dimensions. Geography, therefore, acts to further narrow the concentration of exclusive coastal interests in the case of archipelago nations. Thus, such states face common problems in the areas of transportation and communications, military security and control over access to fisheries and other ocean resources, all of which are greatly complicated by their geographical situation.[125] In this connection, Mr. Tolentino, speaking for the Philippine delegation at the Second United Nations Conference on the Law of the Sea during 1960, summarized his government's justification for extending its territorial sea domain as follows:

> "First, the security of the State demands that it should have exclusive possession of its shores and that it should be able to protect its approaches.
>
> "Second, for the purpose of furthering its commercial, fiscal and political interests, a state must be able to supervise all ships entering, leaving or anchoring in the sea near its coast.
>
> "Third, the exclusive enjoyment of the products of the sea close to the shores of a State is necessary for the existence and welfare of the people and the land territory."[127]

Obviously, travel and commerce between the different regions of archipelagic states must rely in large measure upon the use of sea transportation. This dependence upon the oceans for communications and travel has played no small part in prompting expansive territorial sea claims by states such as Indonesia, the Philippines and the Maldives. Such states view the delimitation of their territorial waters as an altogether different proposition than delimitation with respect to continental coasts. They reject the application of the traditional rules on the ground that the effect of their application would be the disintegration of the state. The continuity of the government's jurisdiction and authority would in their opinion be destroyed by the vast areas of high seas that would divide the land territory of the state if the low-water mark rule were to be applied.[128] There is, therefore, valid reason for concern on the part of the island

nations, who share the common problem of effectively implementing local policy with respect to such vital matters as immigration, entry of aliens and import-export controls, under the circumstances of their peculiar geography.[129] In the case of the Philippines the severity of the problem is illustrated by the currently contained, but long-smoldering insurgency of the communist-inspired Hukbalahup movement, which could potentially receive external support and encouragment through clandestine infiltration of the lengthy and difficult-to guard Philippine coastline.[130] Another problem of government related to the delimitation controversy is that of smuggling. The Philippines in particular has struggled with this problem since independence, but unfortunately with little success.[131] Indonesia likewise suffers lost revenue from the activities of smugglers, in fact, in certain areas, it is estimated that smuggling far exceeds in volume the flow of legitimate commerce.[132] Both the Philippines[133] and Indonesia[134] have problems of cultural and linguistic, as well as geographical unity. In Indonesia, the internal conflict between the island of Java and the outlying territories over the former's dominance within the government led to an abortive rebellion during 1958.[135] The Philippines, likewise, is faced with regionalism with the island of Luzon occupying the preeminent position over the centrally located Visayas and Mindanao

to the south. Inter-regional frictions are not believed to be such, however, as to lead to sectional conflict as experienced by Indonesia, although the possibility cannot be altogether excluded by responsible authorities.[136]

National security in the sense of defense against external threats is also rendered more difficult by the basic configuration of the archipelagic state. The ocean areas and coastlines involved are generally so vast, particularly in light of available military resources, as to make illicit access for the purposes of infiltration or espionage, on the one hand, extremely difficult for coastal authorities to prevent or control, and on the other, relatively easy for those posing the threat to accomplish.[137] In this connection, the Filippino jurist, Coquia, notes the vulnerability of his country to incursions by foreign naval vessels and its lack of power to drive such forces out, citing by way of illustration of the problem the activities of the Imperial Japanese fleet and the ease with which it was able to invade Philippine waters and to occupy the islands during World War II.[138]

Concern for security was also articulated by Indonesian authorities in the explanatory memorandum accompanying Act No. 4 of 1960,[139] in which fear was expressed for the safety of the state in the event, not so much of a war involving Indonesia directly as a combatant, but of

a conflict between foreign naval powers, whose operations in and around Indonesian waters could well jeopardize national unity by disrupting lines of communication and commerce. Particular stress was placed on the danger of the consequences to the inhabitants of the islands in the event of naval battles involving nuclear weapons.

The third major exclusive coastal interest of archipelagic states lies in the appropriation of surrounding waters as a source of food and other resources. Both the Philippines[140] and Indonesia[141] rely heavily upon fish as a source of animal protein in their national diets, while the Maldivian economy is almost totally dependent upon the fishing industry for its main export commodity -- dried fish.[142] As emerging nations faced with the problems engendered by ever-increasing population pressure, Indonesia and the Philippines in particular have felt an urgent need to reserve for themselves the ocean resources of their adjacent waters. This sense of urgency is compounded by the primitive nature of the fishing industry in these states and its inability to compete with the larger, more efficient deep sea fishing boats of other nations, which it is felt, if permitted to operate locally, would deprive the local populace of a basic source of livelihood.[143]

No one can deny the legitimacy of any of the exclusive interests discussed above. Viewed from the perspectives of the claimant states, each, standing alone

or with the others, appears to be of such vital importance to the state as to furnish ample justification for unilateral action designed for its protection and furtherance. If the matter could be left at that, no real problem would exist. However, these coastal interests do not exist in a vacuum, and the pattern of controversy becomes more clear when we add to the claims of the archipelago nations the counter-vailing demands and expectations of other states and the general community.

The Community Interest

Standing in opposition to the exclusive demands of island nations to maximum jurisdiction and control over travel and communications, military security and the natural resources of their adjacent ocean areas, are the equally legitimate inclusive interests of the general community of states. Foremost among these is the concept of the freedom of the seas, which embraces primarily free and unhampered access for all to transportation and communication on the high seas, whether surface, subsurface or aerial. The general community, no less than the claimants, has an interest in the resources contained in the waters surrounding archipelagos in the sense of an inclusive demand for the shared use of their biological resources. Population pressure and hunger are obviously not phenomena peculiar to Indonesia and the

Philippines. Much of the rest of the world also must look to the seas as a vast renewable reservoir of food. Maritime states, in addition, share a further interest in common, namely that of having their national law apply to persons and events on board their flagships.[144]

The community interest in transportation is especially affected by the fact that transit between the islands of, or through straits controlled by, archipelagic states may be the most convenient, if not the only, route between certain points on a voyage. Both with regard to air and sea transport, detours around an entire archipelago would result in significant deviation from, and lengthening of, traditional routes. Obviously, the intensity of the general community interest with regard to transportation will tend to vary in proportion to the location of the archipelago in question and the importance of its waters and straits for navigational purposes.[145] Thus, protests by maritime states were, perhaps, most vehement against Indonesia's claim, considering the strategic importance of waterways such as the Macassar, Molucca and Sunda Straits, which were thereby affected.[146] The Philippine claim, on the other hand, as we have seen, met with somewhat less opposition,[147] while that of the Maldives, perhaps because of the relative isolation of that state, has evoked only relatively mild reaction from other states.[148]

The risks to international shipping and communications posed by declaring archipelagic waters to be internal waters, through which there is no right of innocent passage,[149] are amply illustrated by the truly vast areas of water involved in the three claims under discussion which could theoretically be closed to foreign shipping at the discretion of the coastal authorities. Although Indonesia has by statute enacted an exception to this rule, permitting innocent passage of foreign vessels through its claimed internal waters,[150] nevertheless, the concession was clearly made as a matter of grace and not in recognition of the rights of other states.[151] The position of the Philippines is not quite as clear in this regard.[152] Republic Act 3046 does not address itself at all to the question of innocent passage,[153] however, the Philippine note verbale of 12 December 1956, which was delivered to the Secretary General during the eighth session of the International Law Commission's conference on the regime of the territorial sea, in restating the basic Philippine territorial sea claim, purported to reserve to ships of friendly foreign nations the right of innocent passage.[154] It is also interesting to note that were the claims in question less comprehensive in scope, that is, only to regard the areas enclosed within the archipelagic baselines as territorial rather than internal waters, international air

and sea transport would, nevertheless, still face the potential of serious disruption. Were this the case, sea transport would still be denied the absolute freedom of the high seas it formerly enjoyed, as it could proceed only by virtue of the somewhat nebulous right of innocent passage at the unilateral pleasure of the coastal state. Air traffic would be even more seriously affected, as aircraft may not overfly the territorial sea of another state in the absence of a special treaty or agreement.[155]

With respect to fisheries, there is an equally serious potential for deprivation of community use inherent in typical archipelago claims, which tend to close extensive areas to community exploitation. The rationale of the claimants seems to be that exclusion of foreign fishermen will tend to conserve available resources for their own fishing industries and populations. The reliance of the coastal states on fishing as a source of food has been clearly demonstrated,[156] however, it is questionable whether, in view of the backwardness of local fishing technology, full utilization of available resources is even remotely approached by the typical archipelago state.[157]

The primary value inherent in exclusive coastal claims, as well the general community's interest in fishery resources is the well-being of human beings. The coastal state, of course, has a duty to act effectively

to promote the well-being, in terms of the health and nourishment, of its population. At the same time, the world community is faced with the overwhelming problem of feeding a population growing at an astronomical rate. Experts agree that the oceans constitute an almost inexhaustible source of high quality proteins, fat and carbohydrate, all of which are essential to the maintenance of health in human beings.[158] Although it is generally believed that tropical waters are less favorable hydrographically for the production of dense fish stocks, recent developments indicate that their potential is much greater than was formerly believed. Recent investigations also show that in the waters material to this study -- those of Southeast Asia and the Indian Ocean, few of the existing fisheries are even partially exploited.[159] It stands to reason that fish not caught are essentially fish wasted. In a region of the world inhabited by at least half of the earth's population, most of it sorely deprived of essential foodstuffs, the preeminence of the community interest in shared exploitation of the animal resources of the seas seems well established.

CHAPTER V

APPRAISAL AND RECOMMENDATION

Juridical Appraisal

The Effect of an Absence of Generally Accepted Legal Doctrine Concerning Delimitation of the Territorial Sea of Outlying Archipelagos

It is clear that at the present time there is no agreement among states with respect to rules or norms prescribing any particular system of delimiting the territorial waters of outlying island groups.[160] Nevertheless, this cannot be taken as meaning that states are at liberty to unilaterally adopt whatever methods they may prefer, especially in light of that portion of the decision in the Fisheries Case stating that:

> "The delimitation of sea areas has always an international law aspect; it cannot be dependent merely upon the law of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law."[161]

If one concedes the absence of any generally accepted rules or norms specifically prescribing a method or system of delimitation for outlying island groups, and accepts the pronouncement of the International Court of

Justice that the validity of any unilateral act of delimitation depends upon international law, the question immediately arises --- upon what doctrines or principles of international law does this validity depend? As we have seen, no generally accepted system or method exists, but that is not to say that no legal solution to the problem is available, as there is ample precedent in international law for judicial treatment of difficult problems of this kind.

While the International Court of Justice normally formulates its decisions on the basis of existing rules or principles of law, the sources of which are enumerated in Article 38 of the Court's Statute, in some cases of apparent novelty the Court has rendered decisions on the very ground that there did not exist any generally accepted rules of international law applicable to the factual situation before it. Two significant examples of such decisions are to be found in the Fisheries Case and in the Court's advisory opinion on Reservations to the Genocide Convention,[162] in both of which the Court proceeded on the theory that since there was no generally accepted rule of law governing the issue before it, it was entitled to proceed with an independent examination and solution of the problems involved.[163] Professor Sorensen, in his excellent article on the archipelago

problem,[164] adopts the position that the criteria established in Article 4 of the Territorial Seas Convention concerning the application of straight baselines to coastal regions are such that an international tribunal might be able, by analogy to Article 4, to arrive at a concrete decision on the archipelago problem. He regards an extended acceptance of compulsory adjudication by the states concerned as the only alternative to the dilemna created by the failure of the international community to arrive at a satisfactory agreement on the subject. While Mr. Sorensen's analysis of the situation is no doubt well founded, his proposed solution is essentially negative in approach. To leave a solution to the judicial process requires the expenditure of time -- time in which an appropriate case or controversy suitable for adjudication can arise, be framed for presentation, and then tried. Such an approach also presupposes a willingness on the part of states to litigate the issues, something that obviously cannot be assumed. The goal of achieving and maintaining a workable system of public order for the oceans is too important to leave the problem to the uncertainties of such a negative and time-consuming approach. A positive approach to solution of the problem is, therefore, obviously demanded by the realities of the situation and can be found most effectively through a continuation of past efforts at codification.

This study, accordingly, will go on to evaluate the claims of archipelagic states to delimit their territorial seas in accordance with the so-called archipelago concept in the light of existing law relevant to the problem, and then to propose a possible approach for its solution.

The absence of generally accepted law governing the archipelago problem leaves one further area for comment, namely, the risk, inherent in allowing such a gap in the law to persist, of existing claims, such as those of Indonesia, the Philippines and the Maldives, becoming at some future time established through customary international law.

The elements necessary in general for the maturing of customary international law have been stated to be: "...the concordant and recurring action of numerous States in the domain of international relations, the conception in each case that such action was enjoined by law, and the failure of other States to challenge that conception at the time."[165] Put another way, the technical requirements for establishing a rule of customary international law encompass two essential elements -- a material element in certain past uniformities of conduct, and a psychological element, or opinio juris, involving a certain moral "oughtness", ascribable to such past conduct.[166] With regard to claims such as those at issue here, that is, where a special right at variance with the ordinary rules normally applicable

is advanced, Sir Gerald Fitzmaurice emphasizes the necessity of consent, or more appropriately, acquiescence, on the part of other states.[167] Such consent or acquiescence need not amount to formal or specific approval, and is more appropriately described as "a yielding to principle", or to the logical applications thereof resulting in deep-rooted and approved practices. An absence of objection to such recurrent practices or to claims to apply legal principles in a certain way may give rise to an inference of such yielding or acquiescence.[168] It has been stated in connection with the failure to make appropriate objection that: "Thus it is that changes in the law may be wrought gradually and imperceptibly, like those which by process of accretion alter the course of a river and change an old boundary."[169]

Protests have been lodged against the claims of all three archipelagic states analyzed in this study.[170] There is, however, a theory that protest alone is no more than a temporary bar, which must be followed up and supported by other appropriate and available remedies.[171] While it is arguable that any greater weight will be attached to a protest which is persistently reiterated, Professor Hyde at least appears to subscribe to the necessity of "...ceaseless protests against the acts of the wrongdoer"[172] in order to stay the maturation of

usage into customary law.

Those states opposed to the application of the archipelago concept of delimitation would do well, therefore, while the controversy remains unsettled, to pursue all legal means at their disposal, such as, preferably, bilateral negotiations, reference of the matter to the United Nations or the International Court of Justice, or, if deemed necessary and proper, severance of diplomatic relations or the carrying out of retorsive measures.[173] At a minimum, as Professor Hyde suggests, opponents of the archipelago claims should take care to reiterate from time to time any formal protests previously made by them.

Historic Title as a Justification for the Claims

As we have seen, the Philippines places great reliance on historic title as a basis for its claim. Although not as thoroughly documented or argued, the Indonesian claim likewise, by virtue of the language employed in its assertion -- "historically, the Indonesian archipelago has been an entity since time immemorial,"[174] is clearly based, at least in part, on historic title.

Whether or not a state can be considered to have acquired historic title to a maritime area is said to depend upon at least three conditions:

1) the exercise by the claimant state of authority over the area in question;

2) the continuity of such exercise of authority; and

3) the attitude of foreign states with respect to the claimant's actions.[175]

Applying the title "acquisitive prescription" to the process of perfecting historic title, D.H.N. Johnson, in an article published in the British Yearbook of International Law, describes it as:

> "...the means by which, under international law, legal recognition is given to the right of a state to exercise sovereignty over land or sea territory in cases where that state has, in fact, exercised its authority in a continuous, uninterrupted, and peaceful manner over the area concerned for a sufficient period of time, provided that all other interested and affected states (...in the case of sea territory neighboring states and other states whose maritime interests are affected) have acquiesced in this exercise of authority."[176]

Since the assumption is that a claim to an area as historic waters means a claim to that area as part of the maritime domain of the state, the scope of the authority which must be exercised in order to perfect historic title is sovereignty.[177] Manifestations of the exercise of sovereignty may include governmental activities such as promulgation of laws, regulations and administrative

measures, and the exercise of civil and criminal jurisdiction over the area in question.[178] Also of great weight in this connection is evidence that the claimant not only legislated with respect to the area claimed, but performed other more physical acts as well, such as the erection of public works. Thus in the Minquiers and Ecrehos Case,[179] the International Court of Justice in finding for Great Britain in an action between that country and France over title to certain of the Channel Islands, noted the construction of certain public works as a relatively significant manifestation of the exercise of British sovereignty over those islands. In a maritime frontier dispute between Norway and Sweden concerning the Grisbadarna banks, the Permanent Court of Arbitration in its award delivered in 1909, found the area in question to belong to Sweden, stating among its reasons the factual consideration that Sweden at some expense to herself, and in the conviction that the area was hers, performed certain public functions, such as erecting beacons, measuring the sea and maintaining a lightboat.[180]

The exercise of authority by a state over areas claimed by it must, therefore, be effectively exercised, that is, by deeds as well as by proclamations, and must be maintained over the area for a considerable period of time.[181] No precise length of time has been prescribed as

necessary for the establishment of a usage upon which to base historic title, but, it should be noted that in one case, The Scotia, as little as eight years was held sufficient for the purpose of establishing as customary international law certain maritime practices adopted by states in the interest of safe navigation.[182]

The reactions of other states to claims to establish historic title are crucial to the perfection of such title, as inaction on the part of foreign states may allow historic title to vest in a claimant who has exercised effective, continuous sovereignty during a prolonged period of time over the area concerned.[183] Generally, protest is accepted as a means of preventing the maturing of historic title, as it acts as an indication that the protesting state does not intend to abandon its rights and may even operate, in the opinion of some authorities, to interrupt the running of prescriptive time.[184] With these general principles in mind, an analysis of the historic title aspects of the claims of Indonesia and the Philippines becomes more meaningful.

The better articulated historic title argument, that of the Philippines, proceeds from the initial assumption that the Treaty of Paris, reinforced by certain subsequent international agreements touching on the boundaries of the Philippine Islands, operated to pass

title from Spain to the United States over both the land and sea areas embraced within the coordinates described in the treaty.[185] On the other hand, as we have seen, the United States regards the lines established in these treaties as merely intended to delimit the overall area in which the land areas ceded by Spain were located.[186] A careful reading of the words of Article III of the Treaty of Paris would tend to lend support to the American interpretation. In this regard, Professor Florentino P. Feliciano, a noted Filippino international legal scholar, suggests that the Philippine government's interpretation is not the only possible, nor even the most plausible, reading of the Treaty of Paris, which simply states that "Spain cedes to the United States the archipelago known as the Philippine Islands and comprehending the islands within the following lines: ... ."[187] He submits that the natural import of these words is clearly that what was intended to be conveyed was only the land area found within the stated coordinates, noting that the regular geometric nature of the lines suggests that their purpose was not so much to indicate a political boundary as to insure that all of the islands of the archipelago were properly included in the transfer.[188]

Professor Feliciano generally expresses grave doubts as to the validity of historic title as a basis for the claim of the Philippines. He regards the problem as

one primarily of evidence, particularly one of inquiry into the practice of Spain during her sovereignty over the Philippines and of the responses, if any, thereto of other states. Since, to his knowledge, such an inquiry had never been undertaken, he expressed the opinion that the doctrine of historic title was not supported by adequate evidence to justify its assertion.[189]

With regard to Indonesia's assertion of historic title, one need look no further than to the Dutch ordinance of 1939 concerning the territorial sea of the Netherlands Indies to discover a lack of long continuous usage of viewing what is now known as the Indonesian archipelago as unitary. Article 1 of that ordinance defined the Netherlands Indies territorial sea as:

> "The sea area extending to seaward to a distance of three nautical miles from the low-water mark of the islands or parts of islands, which belong to Netherlands Indies territory..."[190]

With regard to groups of two or more islands, the ordinance granted a limited exception, permitting the three-mile territorial sea limit to be measured from straight lines "...connecting the outermost points of the low-water marks of the islands on the outer edge of the group, at the point where the distance between these points is not more than six miles."[191] This regime, which

was clearly in accord with traditional concepts, remained in effect, having been assimilated into Indonesian law upon that state's achieving independence in 1949, until revoked by the declaration of 14 December 1957 asserting the current claim.[192] It appears doubtful, particularly in view of the numerous protests lodged against the Indonesian claim, that historic title can have been perfected by Indonesia in the short period since 1957.

Although it is not known to what extent, if at all, the government of the Maldives purports to base its claim upon the doctrine of historic waters, there clearly would be little justification for such an assertion. Again without knowing what acts the Maldivian government has performed as manifestations of its exercise of sovereignty over the claimed area, it would be safe to assume that the Maldives, with its 115 square miles of land territory and correspondingly small population, scarcely has the power or resources with which to effectively extend its sovereignty over 150,000 square nautical miles of the Indian Ocean. In any event, the success of the claim, if based on prescription, would be in doubt considering its quite recent assertion and the opposition thereto, manifested by protest of at least one state, the United States.

Claims to Apply the Archipelago Concept of Delimitation Viewed in the Light of Existing International Law

Straight Baselines

As there is at present no generally accepted rule of international law specifically prescribing any particular method of delimiting the territorial seas of mid-ocean archipelagos, it would hardly be appropriate or fair to disallow claims such as those of the Philippines, Indonesia and the Maldives simply because they lack any sound evidenciary basis to bring them within the application of the doctrine of historic waters. Furthermore, notwithstanding the controversy surrounding these claims, it seems doubtful that the claimants can altogether be denied the right to apply straight baselines in delimiting their territorial seas. The decision in the Fisheries Case, as well as Article 4 of the Convention on the Territorial Seas, which has its roots in that decision, both approve this method of delimitation in the formerly equally controversial case of coastal archipelagos. The possibility, therefore, of applying these principles by analogy to outlying archipelagos cannot be overlooked.[193]

The important issue with respect to baselines is, of course, their maximum permissible length. Despite considerable discussion and effort by the various international bodies that have considered the question since the 1930 Hague Conference, no fundamental agreement has ever been

reached. Most of the various rules proposed, however, did agree that baselines should be kept short -- generally at twice the width of the territorial sea or ten miles. In view of the current trend in favor of wider territorial sea margins,[194] as well as the decision in the Fisheries Case which specifically rejected the ten-mile rule for coastal archipelagos and approved baselines of up to 44 miles in length,[195] the present day relevance of these proposed rules appears to be highly questionable.

Again, it is clear that there is no fixed conventional or customary rule as to the allowable length of such lines.[196] However, it is equally clear, as Mr. Evensen concluded in his study, that "...exorbitantly long baselines, closing vast areas of sea to free navigation and fishing, are contrary to international law".[197] Both Indonesia and the Philippines have established baselines far exceeding in length those at issue in the Fisheries Case--in the case of the Philippines, some being as long as 130 and 160 miles.[198] Both states, therefore, should the validity of their use of such baselines ever be put in issue before an international tribunal, would be hard pressed to establish their reasonableness, necessity or propriety.

- Internal Waters

Closely related to the question of baselines is that of the character of the waters enclosed by such

lines. Both Indonesia and the Philippines claim as internal waters all sea areas landward of the baselines they have established. Obviously, the extent of such internal waters is determined by the length and location of the baselines employed. In general, the various proposed rules drafted by international conferences over the years were in accord that waters between and surrounding island groups enclosed by straight baselines should be considered as internal waters.[199] This view, at least with respect to coastal archipelagos, was consecrated by adoption of Article 5(1) of the Convention on the Territorial Sea, which provides that "Waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State".[200]

The general community interest in freedom of navigation is, of course, subject to grave jeopardy of impairment by encroachments on formerly high seas areas through abuse in application of this concept. To mitigate to some extent the potential impact of straight baseline claims on navigational interests, Article 5(2) of the Convention provides that:

> "Where the establishment of a straight baseline in accordance with article 4 has the effect of enclosing as internal waters areas which previously had been considered as part of the territorial sea or of the high seas, a right of innocent passage, as provided in articles 14 to 23, shall exist in those waters."[201]

It has been suggested that, based, upon the foregoing article, internal waters created by application of straight baselines are essentially legally identical to territorial seas, as the main practical distinction between the two lies in the limitation upon the coastal state's sovereignty inherent in the right of innocent passage. Since, the right of innocent passage can be denied by the coastal state in internal waters created by straight baselines only in those areas which would have been so characterized notwithstanding the use of straight baselines, their use operates only to enlarge the area subject to legal rules applicable to the territorial sea.[202] Whether enclosed areas are designated as internal waters or territorial seas, the threat to free and unhampered access to the oceans for all posed by exorbitant straight baseline claims remains significant. This is so because even under the less restrictive regime of the territorial seas, innocent passage by foreign vessels is still subject to a large degree to the unilateral pleasure of the coastal state,[203] while aircraft may not penetrate the superjacent airspace without the benefit of a special treaty or agreement.[204]

Instead of safeguarding the community interest by imposing an arbitrary limit on the length of baselines, and thereby limiting the extent of water areas that could be enclosed as internal waters, the International Court of

Justice in the Fisheries Case prescribed three criteria as determinative of the validity of the application of a straight baseline system: (1) that the baselines employed follow the general direction of the coast; (2) that a close relationship exist between the sea areas claimed and surrounding land formations, and (3) the existence of economic interests peculiar to the region as evidenced by long usage.[205] Of the three, the second is the most relevant to the internal waters question, in the words of the Court: "The real question raised in the choice of baselines is in effect whether certain areas lying within these lines are sufficiently closely linked to the land domain as to be subject to the regime of internal waters."[206]

The rule proposed by Mr. Evensen in his 1958 study drew heavily upon the reasoning in the Fisheries Case in permitting the use of straight baselines as provided in Article 4 of the Convention on the Territorial Sea (at the time of the study, draft Article 5) for delimiting the territorial seas of outlying archipelagos. The first of the Court's criteria was amended in his proposal to require that the baselines follow the "...general direction of the coast of the archipelago viewed as a whole";[207] the second criterion, the linkage between sea domain and land territory, was also stressed in his proposal; but the third, concerning the existence of economic interests peculiar to the region, was given scant mention.[208] Mr. Evensen

acknowledged the lack of any fixed maximum length for baselines and made no attempt to suggest such a limit, choosing instead to caution against "exorbitantly long baselines",[209] on the theory that as their length increases, the closeness of the relationship between the land domain and water area concerned necessarily decreases. His proposed rule also included an essential safeguard for freedom of navigation by stipulating in terms similar to Article 5(2) of the Convention on the Territorial Sea that where waters of an archipelago lying within straight baselines form a strait, such waters cannot be closed to innocent passage of foreign vessels.[210]

Recognizing that the foregoing rules are not binding upon states and that they suffer from an inherent vagueness, particularly as to the critical factor of length of baselines, it is nevertheless interesting to apply them, as an international tribunal might if faced with the issue, to the current claims of archipelagic states. In so doing, the validity of major portions of those claims is immediately called into question. For example, in what way is the entire 86,000 square mile area of the Sulu Sea so related to neighboring Philippine land territory, much of which, such as Palawan and Mindanao, is relatively sparsely populated,[211] as to justify its characterization as internal waters. The same question may be asked with respect to Indonesia's claim to regard the entire Java Sea, which

extends some 600 miles from east to west and 200 miles from north to south, as inland waters.[212] No doubt the ingenuity of the claimants would be equal to the task of producing reasons to support their claims to these areas, but, considering the importance and sheer size of the seas concerned, such reasons would have to be most compelling for an international court to find them sufficient.

The Territorial Sea and Innocent Passage

Since claims to treat ocean areas as territorial waters amount in practice to assertions of complete, continuous and permanent authority over such waters, operating in effect to place them under the full sovereignty of the claimant state, save for the somewhat dubious right of innocent passage,[213] the interests of other states, as well as those of the general community, are substantially affected by such claims. The general community interest in the territorial sea lies primarily in its usefulness as a medium for international transport and communication, while the exclusive interests of the littoral state extend to matters such as control over it as an important means of access to its land mass, both for the purpose of warding off potential threats to its security, as well as for the purpose of protecting internal value processes, particularly those centering around wealth and well-being.[214] The potential for conflict between these diverging interests is amply

illustrated by the controversy surrounding the claims of archipelagic states.

Two legal problems concerning the regime of the territorial sea are of particular relevance to this study, namely, the validity of the breadth of margin claimed, and the nature and reliability of the right of innocent passage available therein for foreign shipping.

The question of the breadth of the territorial sea has long been one of the most controversial problems of international law. Beginning in the sixteenth and seventeenth centuries, the concept of the territorial sea began to develop through a process of interaction comprised of conflicting claims and counter-claims. Out of this process there gradually developed, by the early part of this century, a consensus of nearly all coastal states claiming a territorial sea that the appropriate width was three miles. Some writers even went so far as to contend that this consensus had ripened into a rule of customary international law.[216] Despite the once general acceptance of the three-mile limit, there has been in recent years a marked increase in the number of states claiming territorial seas in excess of that width. State practice in this regard has been in a state of rapidly accelerating change, with new and increasingly expansive claims becoming commonplace. Thus of 133 states and dependent areas surveyed by the

the United States Department of State during 1968, 53 were found to adhere to the traditional three-mile limit, while the balance claimed wider margins ranging, in the main, between three and twelve miles, with the latter being the preponderant measure at 44 claims. A handful only, including a number of South American states claiming 200-mile limits, have asserted claims beyond 12 miles.[217]

All attempts thus far by international conferences to resolve the matter by codification have come to nought. The first such attempt during the 1930 Hague Conference met with so much diversity of opinion that the committee studying the problem was unable to agree on a proposed three-mile rule, and the question never came to a vote.[218] The issue met a similar fate during the Geneva Conventions of 1958[219] and 1960, with the latter failing by one vote to reach agreement on a joint United States-Canadian proposal for a six-mile territorial sea coupled with an additional six-mile exclusive fishing zone.[220]

The International Law Commission in 1955 concluded in its draft articles on the regime of the territorial sea that international practice was not uniform with regard to application of the traditional three-mile limit; that international law would not permit claims in excess of twelve miles, and that states need not recognize claims beyond three miles.[221] The policy of the United States until

quite recently was in accord with the last observation of the draft articles, namely, it adhered to the three-mile limit and acknowledged no obligation to recognize claims by other states to greater breadths.[222] Without attempting to add to the debate over the wisdom or legality of claims to territorial sea margins greater than the traditional three-mile width, it appears safe to say that it is highly questionable whether the three-mile limit still constitutes the governing rule of international law. A majority of states have in recent years rejected that rule, to the point where pressure for a wider regime is becoming almost irresistible.[223] Indeed, the United States, formerly the most adamant proponent of the three-mile limit, has recently announced its willingness, under certain conditions, to agree to a uniform twelve-mile limit.[224]

In the light of this trend and the opinion of the International Law Commission as expressed in its draft article in 1955, which although not binding international law, nevertheless appears to be a correct restatement of the international consensus on the subject, Indonesia's claim to a twelve-mile margin can hardly be condemned as unjustifiable. The territorial seas claims of the Philippines and the Maldives, on the other hand, pose an entirely different problem, as neither purports to lay claim to any specific width of territorial seas. In the

case of the Philippines, the claim is to competence over all waters seaward of the baselines established in her national legislation[225] as bounded by her so-called "treaty limits."[226] In general, the claimed areas far exceed even twelve miles in breadth, and in the most extreme instance extends to a distance of 285 miles between the treaty line and the nearest Philippine land territory.[227] The Maldivian claim differs from that of the Philippines in that the territorial sea of that state is apparently not measured from any territorially related baseline system, but, rather consists of all waters contained within a specified set of coordinates. Both claims, therefore, do violence to Article 6 of the Convention on the Territorial Sea, which provides that "the outer limit of the territorial sea is the line every point of which is at a distance from the nearest point on the baseline equal to the breadth of the territorial sea".[228] The Philippine violation lies in the failure of the outer limit of its territorial sea to run parallel at a uniform width to its baselines, while that of the Maldives lies in a lack of both baselines and a uniform, parallel width of margin.

In a large sense, therefore, both the Philippine and Maldivian claims can be equated to the recent expansive claims of states such as Argentina, Chile, Ecuador, El Salvador, Panama and Peru,[229] which have likewise failed to

gain the acceptance of the world community. Despite the absence of any specific limit in international law, states, nevertheless, are not at liberty to abuse the right of determining the width of their territorial seas.[230] Accordingly, neither the Philippine nor the Maldivian claims to competence over such vast areas of open seas appears to be justified.

The second, but no less important, area of concern pertinent to this discussion is the question of the nature and quality of the rights conferred in archipelagic waters under the concept of innocent passage. Article 14 of the Convention on the Territorial Sea provides, in pertinent part, that "...ships of all States...shall enjoy the right of innocent passage through the territorial sea."[231] With respect to straits, which constitute an especially important element of the archipelago problem, the Convention at Article 16(4) provides that "there shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial seas of another state."[232] The Convention also, as mentioned previously, in Article 5(2) guarantees innocent passage through waters which have been transformed from territorial sea or high seas into internal waters as a result of applying straight baselines in accordance with Article 4.

The concept of innocent passage has been described as a compromise between the doctrine of the freedom of the seas and the principle of sovereignty of states. Colombos puts it in terms of an "attempt to reconcile the freedom of ocean navigation with the theory of territorial waters."[233] Professor McDougal also looks upon the concept as a compromise calling on the one hand for "...free access to the territorial sea and on the other for restrictions of varying severity on that access."[234] In this regard, the community interest in the full and efficient use of the oceans, in terms of freedom of passage, coincides with the exclusive coastal interest common to all states in protecting local value processes. The latter is recognized in the qualification that passage must be innocent, that is not offensive to certain coastal interests, in order to be privileged.[235] It should be noted at the outset that the right of innocent passage is inapplicable with respect to three important types of passage, namely, submerged passage of submarines, which must, pursuant to Article 14(6) of the Convention, navigate on the surface and display their flags while in the territorial sea; to overflight, as aircraft have no right to overfly the territorial sea of another state;[236] and to passage through internal waters.[237]

The key word in the principle is "innocent", and the problem is, obviously, who is to determine the innocence, vel non, of a particular passage. The Convention itself

attempts to define the word "innocent" in paragraph 4 of Article 14, which states that "passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State."[238] As to who is to apply this standard, Professor McDougal states that "...the authority accorded a coastal state in the territorial sea is, and must be, very comprehensive indeed, extending even to a substantial measure of discretion in determining the innocent character of a particular passage, with only the ordinary sanctions of reciprocity and retaliation available to assure reasonable exercise of discretion."[239] He has also described the concept of innocent passage as "... but another, semantically equivalent, way of talking about the scope of coastal authority over access to the territorial sea."[240]

As mentioned above, claims to subject certain waters to the regime of the territorial sea amount, in effect, to claims to assert complete, continuous and permanent authority over them, in short full sovereignty, subject only to the right of innocent passage.[241] The following have been listed among the components of this claimed authority: 1) competence to exclude or suspend passage; 2) authority to regulate navigation; 3) competence over events or persons on board passing vessels, as well as over the vessel itself for the purpose of judging claims against

it; 4) authority to prescribe and apply regulations concerning security, customs, health and pollution, and 5) authority to control belligerent use of neutral waters.[242]

The greatest potential threat to the general community interest in the fullest productive use of the sea posed by the expansive territorial sea claims of the archipelagic states lies in the risk that coastal states in the exercise of their claimed authority might unreasonably act to restrict the right of innocent passage, perhaps for entirely arbitrary reasons. This essential dependence of the right of innocent passage upon the unilateral goodwill of the littoral state has been amply illustrated by the action taken in 1958 by the Indonesian government in prohibiting Dutch vessels from passing, without prior permission, through Indonesian territorial waters, save for along one certain sea route.[243] A similar edict was pronounced during 1960 forbidding Dutch vessels to pick up or discharge passengers or cargo in Indonesian waters.[244] Other impediments to the freedom of the sea inherent in the concept of the territorial sea, such as the absence of a right of overflight and restriction upon submarine navigation, are, of course, necessarily extended in direct proportion to the size of the territorial sea claim asserted.

Applying the test requiring that an assertion of authority be reasonably proportionate to the interests sought thereby to be protected, at the same time keeping in mind

the extent of interference with community interests and uses,[245] to the claims of the archipelagic states prompts the conclusion that large portions of the areas claimed as territorial seas, not to mention those deemed internal waters, are clearly unreasonable encroachments on the high seas bearing no justifiable relation to the bona fide needs of the claimants. Such questionable areas would include, for example, much of the area claimed by the Philippines as within her so-called "treaty limits".

Policy Appraisal---Balancing the Interests

The nature and extent of the concentration of exclusive coastal interests in adjacent waters peculiar to island-based states and the community interest in the same waters is discussed above at some length. The task of reconciling or balancing these largely conflicting interests on a universal basis, that is, on a basis applicable at once to all archipelagos, is almost impossible, considering the wide variations that exist, not only in terms of geography, but with respect to social, political and economic factors that cause the importance attached to any particular coastal interest to vary considerably among archipelagic states. Needless to say, the intensity of the concentration of community interests in uses such as for example, fishing or transportation, will vary also depending upon the availability

and desirability of resources in the first instance, and upon the location of the archipelago with relation to international trade routes in the second. Accordingly, the comments that follow are necessarily general in scope, recognizing that conditions do vary widely, not only as between different archipelagos, but within specific island groups as well.

This attempt to strike an effective balance between the exclusive interests of the archipelagic states and the community interest will proceed on the assumption postulated by Professor McDougal that the community goal is, or should be, "...the greatest production and widest possible sharing of values among people",[246] keeping in mind the validity of those traditional assertions of coastal control reasonably necessary for a state to both protect its security and to gain reasonable access to the resources of the seas.

In summary, the three major components of the concentration of archipelagic coastal interests, as most ably described by Mr. Tolentino during the 1960 Geneva Conference are the security of the state, the protection of its commercial, fiscal and political interests, and the appropriation and protection of ocean resources.[247]

Turning first to security considerations, specifically the concern, as most vocally expressed by Indonesia, for the safety of the state's population and territory in the event of naval hostilities in its waters

in which it is not a participant,[248] the question of the duties imposed by neutrality arises. Under Article 5 of Hague Convention XIII, the use of neutral ports and waters as a base for operations against an enemy is forbidden to belligerents.[249] From this rule flows the logical conclusion that a neutral must do everything in its power to prevent belligerents from thus abusing its territory.[250] This task is difficult enough to accomplish within a three-mile territorial sea by states possessing modern and efficient naval forces,[251] let alone by the relatively poorly equipped forces available to under-developed states such as Indonesia, the Philippines and the Maldives, which claim vastly larger sea areas. It stands to reason that the wider the territorial sea, the easier it becomes for an unprincipled belligerent to abuse the neutrality of a state, and, perforce, for the neutral state to prevent such abuse. If a neutral is unwilling or unable effectively to perform its duty in this respect, a participant is authorized, and may be expected, to take action against enemy vessels abusing neutral territorial seas.[252] Thus, to a large extent, the security sought by the archipelagic claimants through their expansive claims, to the extent that they invite the presence of warships of unscrupulous belligerents, is, if not defeated, certainly not enhanced by such assertions. The argument that an expanded territorial sea is essential to national defense

because of the range and destructive capacity of modern weapons, the speed of modern aircraft and ships, along with other technological factors, likewise tends to fall apart under the force of its own logic, as not even the most expansive sea margin imaginable is adequate to effectively insulate any state from modern weaponry. Clearly, therefore, the extent of the authority asserted by the archipelagic claimants in the name of security is not at all proportionate to the reasonable protection of that interest. The potential of serious interference with international sea and air transport posed by claims entailing the creation of extensive regions of internal waters within straight baselines and of equally extensive reaches of territorial sea, in both of which the claimant may exercise extensive, indeed exclusive, discretionary control over access, militates against the propriety of the archipelagic claims as presently formulated.

The extent of authority asserted for the protection of the commercial, fiscal and political interests of the claimants likewise appears to weigh ratherly lightly in the scales of proportionality when measured against the general community interest in freedom of navigation. It is understood that ocean transport is essential to the trade and communications of an island-based state. However, this need is certainly not basically incompatible with the fullest and freest use of the same waters by

international traffic. Turning again to the duties of coastal states, it is questionable, in the light of Article 15(2) of the Convention on the Territorial Sea, which requires "the coastal State...to give appropriate publicity to any dangers to navigation, of which it has knowledge, within its territorial sea",[253] whether underdeveloped states, such as those involved in the archipelago problem, are either able or willing to fulfill their obligations toward foreign vessels within their claimed sea domains. Implicit in the Convention's requirement is, at a minimum, the provision of buoys, light-houses and other navigational aids to mark channels and hazards. The ability of these states to adequately provide such navigational aids within their claimed sea domains is greatly in doubt, considering estimates that for the United States to meet its obligations to foreign shipping, in the event of an increase of its territorial sea from three to twelve miles, would require an initial capital outlay of $8 million, plus added annual operating costs of $180 million.[254]

Archipelagic states are no less, and perhaps to some extent more, dependent upon unhampered sea-borne commerce for their economic viability than other states. As underdeveloped nations, they share a need for importation, at the lowest possible cost, of manufactured goods

necessary for development. It is possible that, in the flush of their new found independence and assertions of sovereignty through expansive territorial sea claims, they have lost sight of the potential lurking in those very claims for added costs to themselves for ocean transported goods. Obviously, if merchant vessels are required to avoid large areas of formerly high seas because of adverse coastal assertions of authority, the result will be increased shipping costs and, necessarily, higher prices to the consumer, including, ultimately, the archipelagic states.[258]

Likewise, control of smuggling and other violations of commercial or fiscal regulations of the coastal state, while of vital concern, clearly does not justify or require complete competence, including arbitrary authority to exclude foreign vessels, over adjacent waters, particularly when more selective measures are available.

The proponents of the archipelago concept rely to a very great extent for justification of their claims upon a purported need to extend their competence over offshore fisheries in order to conserve fish and other economic resources for their own fishing industries and populations. The principal effect of such claims is to deprive other states of the unequivocal right of access to fishing grounds formerly freely available to all.[256]

Here again, the scope of authority sought to be asserted falls short of any proportionality to the interest

it is designed to protect, as the reasoning of the claimants is based to a great extent upon certain logical fallacies. Implicit in the claimant's assertions are the twin assumptions that by merely extending their sea margins, more fish will be caught by their own fishermen, while foreigners will be prevented from depleting available resources. This reasoning further assumes that the local fishing industry is equal to the task of achieving maximum yields; that the major sources of supply are located within the claimed area of competence, and that this area will always be adequate to meet local needs.[257] The backwardness of the local fishing industries of the claimants is an established fact, as is the only marginal exploitation of the fisheries in their adjacent waters.[258] As recent studies in fishing technology have established that such marginal fishing operations are basically uneconomical and wasteful, it can be fairly said that the act of appropriating all of the living resources in adjacent waters by these claimants amounts to selfishness, not only as to their use, but as to their non-use as well.[259]

A basic characteristic of most fish is that even the more sedentary species range over wide distances of the continental shelves, while pelagic varieties are known to travel over even greater expanses of water during their life cycles, both varieties doing so completely without regard to political boundaries. This biological fact

contradicts directly the expectation of the claimants that the major sources of supply are located within the areas claimed by them, and renders their attempts at conservation and achieving exclusive access largely illusory.[260] This leads to the third assumption, namely that the claimed areas will always suffice for the claimant's needs. This assumption overlooks, however, the very real possibility that certain species of fish, with their inherent disdain for political boundaries, might choose to leave the claimed areas, or to concentrate more densely elsewhere. Such a trend could be caused by depletion brought about by overfishing, or by some natural or artificial calamity, such as disease or pollution. Under such circumstances, claimants who are now contending for expanded competence to exclude others in their own adjacent waters might well find that their interests had shifted toward an ability to fish in other waters.[261]

There is, above all, a moral problem involved in claims, such as those of the archipelagic states, which discriminate against all the peoples of the world with respect to as basic a resource as food. Such discrimination has come to be accepted with respect to land-based resources and to the resources of the continental shelf located within the 200 meter isobath or beyond to the depth permitting exploitation. However, if a right not to be discriminated against with regard to fishing grounds can

be said to exist, it is because such resources are so peculiarly adapted, and have for centuries been freely available, for community use.[262]

In summation, it seems well established that none of these claims to delimit the territorial sea in accordance with the archipelago concept adequately takes into account the deprivations to community interests that necessarily flow from a heavy-handed application of that principle. Applying the test of proportionality to these claims reveals that, to a large extent, the interests sought to be protected by expanded sea frontiers are, more often than not, to some extent prejudiced, rather than served by such action. The following section, therefore, will attempt to suggest an alternative approach to the problem.

Recommendation

The preceding discussion leads to the inevitable conclusion that, in the words of Professor Feliciano, the archipelagic claimants have employed "...an unnecessarily blunt and rigid instrument"[263] in attempting to protect their legitimate coastal interests by way of an overly expansive application of the archipelago concept of delimitation, when much more selective and flexible approaches, such as the creation of appropriate contiguous zones, having a lower potential for conflict with equally

legitimate community interests, are available. This is not meant to suggest, however, an absolute abandonment of the straight baseline method of delimitation in these cases and an unequivocal return to the low-water mark baseline for archipelagos. On the contrary, as suggested above,[264] this method of delimitation, due to the absence of generally accepted prescriptions and by analogy to the rules governing coastal island groups embodied in the Fisheries Case decision and Article 4 of the Convention on the Territorial Sea, can hardly be condemned out of hand as contrary to established international law. The difficulty lies in the manner and, perhaps, the spirit in which this method has been applied by certain states. It can be fairly stated that, in a large sense, the archipelagic states have strained the permissible limits of the straight baseline approach by going far beyond the very reasonable criteria for its application established in the Fisheries Case. While the most desirable immediate solution would be a unilateral adjustment of these claims to bring them within a more reasonable framework, considering factors such as nationalism and the relative quiescence of the problem, such a turn of events can hardly be expected. With regard to the current lull in the controversy, it is interesting to note that the United States, at least, has attempted to avoid any direct confrontations over access to archipelagic

waters, while withholding recognition of such claims. At the same time, none of the archipelagic states have attempted to interfere with navigation by American ships within their claimed waters.[265]

The United Nations General Assembly has called for a third conference on the law of the sea, to convene during 1973,[266] for the purpose of establishing an equitable regime for the sea-bed lying beyond the limits of national jurisdiction and for further work on the entire spectrum of law of the sea matters, including the territorial sea and the question of its breadth. While agreement on these vital questions is obviously of paramount importance, it would seem that, due to the identity of many of the issues involved, the time would be ripe for a resolution of the archipelago problem as well. Indeed, such a resolution could be at least partially achieved as a result of a reasonable agreement on the general territorial sea question. The United States government has, in this regard, recently announced its views concerning a proposed territorial sea regime. In broad terms, these views call for setting the limit of the territorial sea at twelve miles, provided agreement is reached concerning reliable guarantees for the right of innocent passage and freedom of transit through and over international straits, and for carefully defined preferential fishing rights for coastal

states on the high seas.[267] Such a regime, particularly one coupled with a provision for preferential fishing rights, should be more than adequate for the protection of the coastal interests of archipelagic states. It would, however, standing alone, apply only to areas seaward of the straight baseline systems of such states, leaving unresolved the thorny problem of the waters enclosed by those lines, which are currently characterized as internal waters.

As suggested previously,[268] under existing norms, internal waters created by application of straight baselines are essentially identical in legal effect to territorial seas, since they are equally subject to the right of innocent passage of foreign vessels.[269] It seems, therefore, somewhat specious, even under the current regime, to confuse matters by perpetuating what amounts to a semantical anamoly. Assuming, therefore, a general agreement on the vital issues of the breadth of the territorial sea and of innocent passage, especially through international straits, including overflight, essentially along the lines envisioned by the United States government, the mid-ocean archipelago delimitation problem could largely be resolved by further agreement on a rule essentially identical to that laid down in the Fisheries Case and in existing Article 4 of the Convention on the Territorial Sea. The major proposed distinction would be that waters landward of appropriately adjusted existing straight baseline systems, would be

redesignated as territorial waters, thereby removing, under hopefully improved provisions concerning innocent passage and overflight, the gravest threats to the community interest in free navigation. Internal waters, in the meantime, would be established in accordance with the ordinary rules, by reference to a secondary baseline system. Thus, in the ordinary case, internal waters would comprise those waters landward of this secondary baseline, which would ordinarily follow the sinuosities of the coast at the low-water mark.[270] Exceptions to the foregoing would, of course, be recognized for bays and rivers flowing into the sea,[271] while, by assimilating the principal islands of the group to the "mainland" presently contemplated in Article 4 of the Convention, this secondary baseline system could be constructed in such a way as to create internal waters in coastal areas appropriately "indented and cut into", provided the criteria presently prescribed in Article 4 are met.

As in Mr. Evensen's proposal, and as the International Court refrained from doing in the Fisheries Case, no maximum length for baselines is suggested in this study, nor, for that matter, is one considered desirable. While this would operate to leave a large area for potential abuse by states in the exercise of their discretion in delimiting their sea boundaries, it, nevertheless, achieves the object of flexibility, which, considering the wide geographical, social,

political and economic variations among archipelagos, is considered a far more desirable end. This proposal is also subject to criticism on the ground that, even if applied conservatively and in good faith, the archipelagic states will still be able to subject large areas to the regime of the territorial sea. The answer, of course, is that a satisfactory outcome to the forthcoming Conference will hopefully eliminate most of the major disabilities inherent in the concept of the territorial sea currently adversely affecting community interests. In any event, archipelagic coastal interests viewed in context are such as to legitimately require some measure of expanded authority over adjacent waters. To offer such states anything significantly less comprehensive in scope would, therefore, in all likelihood foreclose the possibility of any sort of rational settlement of the problem.

FOOTNOTES

[1] McDougal and Schlei, "The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security," 64 Yale L.J. 648, 655-656 (1955).

[2] McDougal and Burke, "Crisis in the Law of the Sea: Community Perspectives Versus National Egoism," 67 Yale L.J. 539 (1958).

[3] McDougal and Burke, "The Community Interest in a Narrow Territorial Sea: Inclusive Versus Exclusive Competence Over The Oceans," 45 Cornell L.Q. 171, 174-175 (1959).

[4] Ibid.

[5] Coquia, "The Problem of the Territorial Waters of Archipelagos," 7 Far Eastern L.R. 435 (1961).

[6] Evensen, "Certain Legal Aspects Concerning the Delimitation of the Territorial Waters of Archipelagos," U.N. Doc. A/CONF. 13/18, U.N. Conference on the Law of the Sea, 1st Geneva, 1958, Official Records, Vol. I, 289, 290.

[7] C. Colombos, The International Law of the Sea (6th rev. ed., 1967), 120.

[8] P. Jessup, The Law of Territorial Waters and Maritime Jurisdiction (1927), 457.

[9] 1 Schwarzenberger, International Law (2nd ed., 1949), 156.

[10] 1 Hyde, International Law Chiefly as Interpreted and Applied by the United States (2nd rev. ed., 1945) 485.

[11] 3 Gidel, Le Droit International Public de la Mer (1934), 718 (translation by author).

[12] Coquia, "The Territorial Waters of Archipelagos", 1 Philippine L.R. 139, 149-151 (1962); J. Syatauw, Some Newly Established Asian States and the Development of International Law (1961), 188.

[13] Sorensen, "The Territorial Seas of Archipelagos," 6 Netherlands Int'l L.R. (Special Issue, July, 1959) 315, 316.

[14] Conference for the Codification of International Law, Bases for Discussion, Vol. II, Territorial Waters, Geneva, 1929, League of Nations Doc. C.74.M39.1929.V, 104-105.

[15] Id. at 163.

[16] Id. at 168.

[17] Id. at 155.

[18] Id. at 174.

[19] Id. at 190.

[20] Sorensen, supra note 13, at 317.

[21] 3 Verzijl, International Law in Historical Perspective (1970), 73.

[22] League of Nations Doc. C.74.M.39.1929.V, supra note 14, at 51.

[23] Sorensen, supra note 13, at 318.

[24] Y.B. Int'l L. Comm'n, 1953, Vol. II, 69-70 (translation by author).

[25] Id. at 32-33.

[26] Id. at 69-70.

[27] Y.B. Int'l L. Comm'n, 1954, Vol. II, 5.

[28] Sorensen, supra note 13, at 319.

[29] Y.B. Int'l L. Comm'n, 1955, Vol. I, 217.

[30] Id. at 217-218.

[31] Id. at 218.

[32] Ibid.

[33] Y.B. Int'l L. Comm'n, 1956, Vol. II, 69-70.

[34] Id. at 270.

[35] Id. at 257.

[36] See note 33 supra.

[37] Convention on the Territorial Sea and the Contiguous Zone, Sept. 10, 1964, 15 U.S.T. 1606, T.I.A.S. 5639.

[38] Evensen, supra note 6, at 289.

[39] U.N. Doc. A/CONF. 13/40, U.N. Conference on the Law of the Sea, 1st Geneva, 1958, Official Records, Vol. IV, 7.

40 Id. at 14-15 and 43-44.

41 U.N. Doc. A/CONF. 13/40, U.N. Conference on the Law of the Sea, 1st Geneva, 1958, Official Records, Vol. III, 227.

42 Id. at 239.

43 Sorensen, supra note 13, at 324.

44 Id. at 316.

45 United Kingdom v. Norway, Judgment of 18 Dec. 1951, I.C.J. Rept., 1951, 116-206 (hereinafter referred to as the "Fisheries Case").

46 Evensen, "The Anglo-Norwegian Fisheries Case and Its Legal Consequences," 46 Am. J. Int'l L. 609, 610 (1952).

47 Fisheries Case, 126.

48 Ibid.

49 Id. at 119-123.

50 Id. at 123-124 and 134.

51 Id. at 138.

52 Y.B. Int'l L. Comm'n, 1956, Vol. II, 267 (this version used instead of the corresponding passage in the I.C.J. Rept., as the latter is distorted by printing errors).

53 Fisheries Case, 133.

54 Id. at 128.

55 Evensen, supra note 6, at 300-301.

56 Sorensen, supra note 13, at 318.

57 M. McDougal and W. Burke, Public Order of the Oceans (1962), 362.

58 Evensen, supra note 6, at 295-296.

59 Id. at 297. For the official U.S. position, see U.S. Dept. of State, Office of the Geographer, "Sovereignty of the Sea," Geographic Bull. No. 3, 1969, 15.

60 Ibid; 4 Whiteman, Digest of International Law (1965), 275.

61 Ibid.

62 Pearcey, "Measurements of the U.S. Territorial Sea," 40 Dept. of State Bull., 29 June 1959, 963, 965.

63 Island Airlines, Inc. v. Civil Aeronautics Board, 352 F2d 735 (1965).

64 U.N. Legislative Series, 1957, ST/LEG/SER.B/6, Laws and Regulations on the Regime of the Territorial Sea, 39-40; 4 Whiteman, 282-283; B. MacChesney, Situation, Documents and Commentary on Recent Developments in the International Law of the Sea, (U.S. Naval War College, 1961), 487-488.

65 Y.B. Int'l L. Comm'n, 1956, Vol. II, Doc. A/CN.4/99, 69-70.

66 Dellapenna, "The Philippines Territorial Water Claim in International Law," 5 J.L. & Econ. Dev. 45, 47 (1971).

67 U.N. Doc. A/CONF. 19/9, U.N. Conference on the Law of the Sea, 2nd Geneva, 1960, Official Records, 70-77.

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Peace Treaty with Spain, 10 December 1898, 30 Stat. 1754, T.S. 343, Art. III. See also Treaty with Spain for Cession of Outlying Philippine Islands, 7 November 1900, 31 Stat. 1942, T.S. 345, and Boundary Convention with Great Britain, (North Borneo--Philippines), 2 January 1930, 47 Stat. 2198 (Part II), T.S. 856.

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Republic Act 3046, "An act to Define the Baselines of the Territorial Sea of the Philippines," June 17, 1961, as amended, printed in U.S. Dept. of State, International Boundary Study, Series A, "Limits in the Sea," No. 33, of 26 March 1971, at 1-7.

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U.S. Dept. of State, "International Boundary Study," supra note 71, at 8.

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Ibid.

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4 Whiteman, 284; Brock, "Archipelago Concept of Limiting Territorial Seas," 19 Naval War College R.34, 65 (1966). For another translation, see Syatauw, supra note 12, at 173.

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Indonesian Government Ordinance No. 8 of 1962, Regarding the Peaceful Passage of Foreign Vessels in Indonesian Waters, Promulgated 28 July 1962, Statute Book 1962, No. 36.

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U.N. Doc. A/CONF. 13/39, U.N. Conference on the Law of the Sea, 1st Geneva, 1958, Official Records, Vol. III, 43-44.

78
See note 75 supra.

79
The text of the 1969 Constitution is unavailable, however, pertinent information is contained in U.S. Dept. of State Airgram (unclas.), 28 Feb. 1971, from American Embassy, Colombo, Ceylon, to Dept. of State. The stated coordinates were: Latitudes 7° 10¼' N and 0° 45¼' S and Longitudes 72° 29¼' E and 73° 49' E. For the current constitutional provision see note 83, post.

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The Statesman's Y.B., 1970-71, 1141; U.S. Dept. of State, Fact Book of the Countries of the World (1970), 119.

81
Republic of Maldives Embassy, Colombo, Ceylon, diplomatic note of 11 April 1970, forwarded to U.S. Dept. of State by American Embassy Colombo Airgram of 26 April 1971 (unclas.).

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Constitution of the Republic of Maldives, 11 November 1968, Article I. (U.S. Dept. of State unofficial translation) Note that coordinates used in the current claim differ slightly from those originally put forward in 1964--compare note 79 supra.

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Bill No. 5/69 Javiyani, "The Territorial Limits and Fishing Territory", as amended by Bill No. 52/70, Javiyani of 30 December 1970. (U.S. Dept. of State unofficial translation).

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McDougal and Burke, supra note 57, at 411.

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Ibid.

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C. Fisher, South-East Asia (1966), 691; U.S. Navy Hydrographic Office, Sailing Directions for the Philippine Islands, (H.O. Pub. No. 79), 3.

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O. Corpuz, The Philippines (1965), 3; Fisher, supra note 103, at 693.

105
Brock, supra note 74, at 65.

106
Kennedy, "A Brief Geographical and Hydrographical Study of Straits which Constitute Routes for International Traffic," U.N. Doc. No. A/CONF. 13/6 and Add. 1, 1 Official Records 114, 128.

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Syatauw, supra note 12, at 170.

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Syatauw, supra note 12, at 169; Kennedy, supra note 106, at 125-128.

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113
New York Times, January 17, 1968, at 1, col. 8.

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Id., October 18, 1970, at 1, col. 7.

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Id., December 16, 1970, at 4, col. 4.

116
Id., July 27, 1965, at 13, col. 13.

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Corpuz, supra note 104 at 13.

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See note 64 supra.

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See note 74 supra.

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McDougal and Burke, supra note 57, at 412.

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Coquia, supra note 5, at 453.

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McDougal and Burke, supra note 57, at 412.

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Corpuz, supra note 104, at 109-111.

131 Id. at 125-126.

132 Fisher, supra note 103, at 355.

133 Corpuz, supra note 104, at 4; Cutshall, supra note 108, at 10.

134 Fisher, supra note 103, at 368-373.

135 Id. at 379.

136 Cutshall, supra note 108, at 9.

137 McDougal and Burke, supra note 57, at 412.

138 Coquia, supra note 128, at 453.

139 See note 71 supra.

140 Coquia, supra note 12, at 156; Fisher, supra note 103, at 713.

141 Fisher, supra note 103, at 334.

142 See note 85 supra.

143 Coquia, supra note 12, at 156.

144 Feliciano, "Comments on the Territorial Waters of Archipelagos," 1 Philippine Int'l L.R. 157, 159 (1962).

145 McDougal and Burke, supra note 57, at 413.

146 See note 95 supra.

147 Ibid.

148 See note 96 supra.

149 Articles 5 and 14 of the Convention on the Territorial Seas, taken together, clearly restrict the right of innocent passage to territorial waters. See also Shalowitz, supra note 97, at 23.

150 See note 76 supra.

151 Lawrence, supra note 100, at 71.

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153 See note 71 supra.

154 See note 65 supra.

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170 See generally text accompanying notes 90-96, supra.

171 Y. Blum. Historic Titles In International Law (1965), 165; MacGibbon, "Some Observation on the Part of Protest in International Law," 30 Brit. Y.B. Int'l L. 293, 311 (1953).

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173 Blum, supra note 171, at 160.

174 See note 74 supra.

[175] U.N. Doc. A/CN.4/143, "Juridical Regime of Historic Waters, including Historical Bays," Y.B. Int'l L. Comm'n, 1962, Vol. II, 1, at 13.

[176] Johnson, "Acquisitive Prescription in Interanational Law", 27 Brit. Y.B. Int'l L. 332, 353 (1950).

[177] Id. at 344-345; see also Blum, supra note 171, at 100-110.

[178] U.N. Doc. A/CN.4/143, supra note 175, at 14.

[179] France v. United Kingdom, Judgment of 17 Nov. 1953, I.C.J. Rept., 1953, 46.

[180] Sweden v. Norway, Arbitral award of 23 Oct. 1909, Permanent Court of Arbitration, U.N. Repts. of Int'l Arbitral Awards, Vol. XI, 161.

[181] U.N. Doc. A/CN.4/143, supra note 175, at 15.

[182] The Scotia, 81 U.S. (14 Wall.) 170 (1871).

[183] U.N. Doc. A/CN.4/143, supra note 175, at 17.

[184] MacGibbon, supra note 171, at 307.

[185] See note 64 supra.

[186] See note 87 supra.

[187] Treaty of Paris, supra note 68.

[188] Feliciano, supra note 144, at 160-161; Sorensen, supra note 13, at 325; Dellapanna, supra note 66, at 53.

189 Id. at 161; Dellapanna, supra note 66, at 53-54.

190 Syatauw, supra note 12, at 171.

191 Ibid.

192 Id. at 172-173.

193 Sorensen, supra note 13, at 326.

194 McDougal and Burke, supra note 57, at 520-540.

195 Fisheries Case, supra note 45, at 131.

196 Feliciano, supra note 144, at 160.

197 Evensen, supra note 6, at 302.

198 Feliciano, supra note 144, at 160. Bearings, azimuth and distance in meters of all Philippine baselines are set forth in U.S. Dept. of State, "International Boundary Study," supra note 71, at 2-7.

199 See generally text accompanying notes, 13 through 34 supra.

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218 Conference for the Codification of International Law, Official Records, Volume I, Report of the Second Committee on the Territorial Sea, 1st Hague, 1930, League of Nations Doc. C.351.M.145.1930.V, at 123.

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220 Dean, supra note 99, at 782.

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222 U.S. Dept. of State, "Sovereignty of the Sea," supra note 59, at 8.

223 Gormley, "The Unilateral Extension of Territorial Waters," 43 U. Det. L.J. 695, 726 (1966); Syatauw, supra note 12, at 191-194.

224 Speech by John K. Stephenson, Legal Advisor of the Dept. of State, delivered to the Phila. Bar Assoc. on 18 Feb. 1970, as contained in 9 Int'l L. Mat'ls 434-440 (1970).

225 See note 71 supra.

226 See note 68 supra.

227 Dellapenna, supra note 66 at 48.

228 Convention on the Territorial Sea, supra note 37, Art. 6.

229 U.S. Dept. of State, "Sovereignty of the Sea," supra note 59 at 28-29.

230 McDougal and Burke, supra note 57 at 498.

231 Convention on the Territorial Sea, supra note 37, Art. 14(1).

232 Id. Art. 16(4).

233 Colombos, supra note 7 at 113.

234 McDougal and Burke, supra note 57 at 185.

235 Ibid.

236 See note 155 supra.

237 See note 149 supra.

238 Convention on the Territorial Sea, supra note 37, Art. 14(4).

239 McDougal and Burke, supra note 57 at 66.

240 Id. at 179-180.

241 McDougal and Burke, supra note 2 at 578-579; Feliciano, supra note 144 at 162.

242 McDougal and Burke, supra note 2 at 578-579.

243 4 Whiteman at 386.

244 New York Times, 20 June 1960, at 56, col. 7.

245 McDougal and Burke, supra note 2 at 579.

246 Id. at 568, n. 105.

247 See note 127 supra.

248 See note 79 supra.

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257 Wilkes, "The Use of World Resources Without Conflict: Myths about the Territorial Sea," 14 Wayne L.R. 441, 451 (1967).

258 See notes 158-159 supra.

259 Wilkes, supra note 257 at 452.

260 McDougal and Burke, supra note 57 at 459.

261 Wilkes, supra note 257 at 460.

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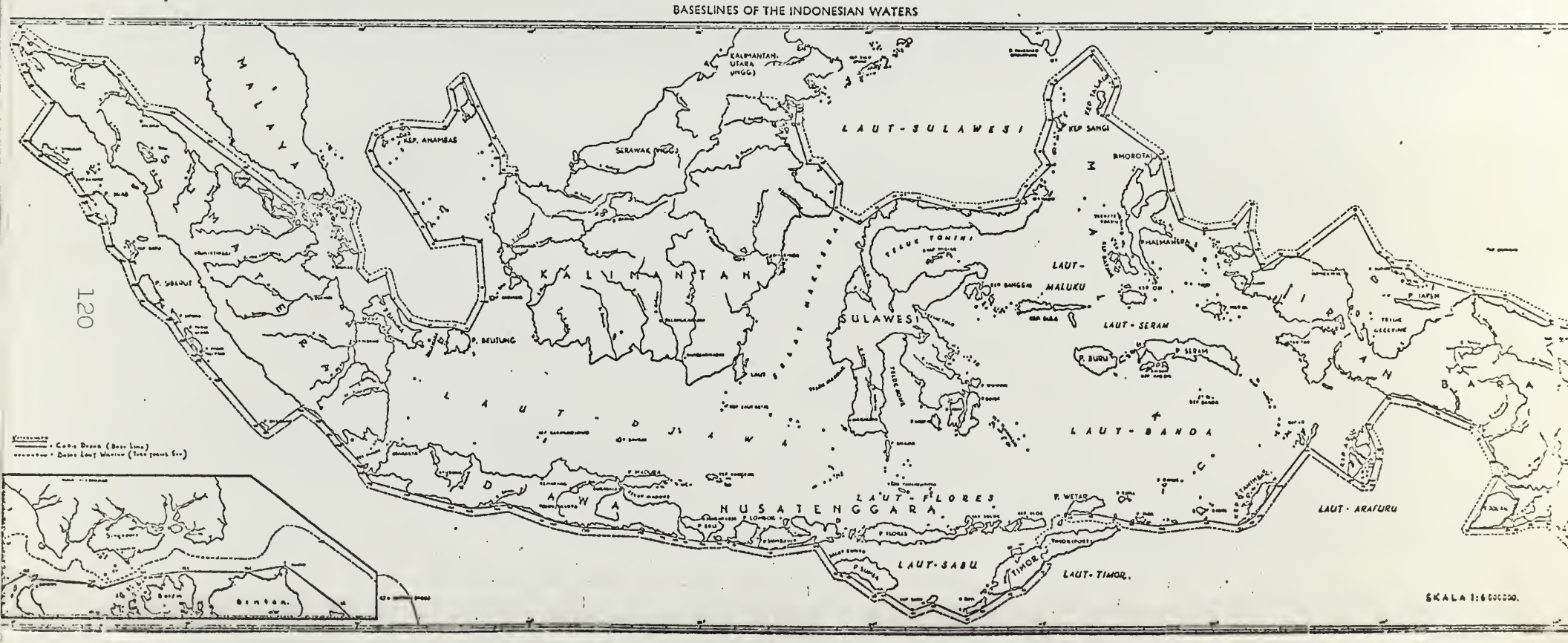
270 Convention on the Territorial Sea, supra note 37, Art. 3.

271 Id., Articles 7 and 13.

Philippines Straight Baselines

PHILIPPINES

Source of Data, Office of the Geographer, Department of State



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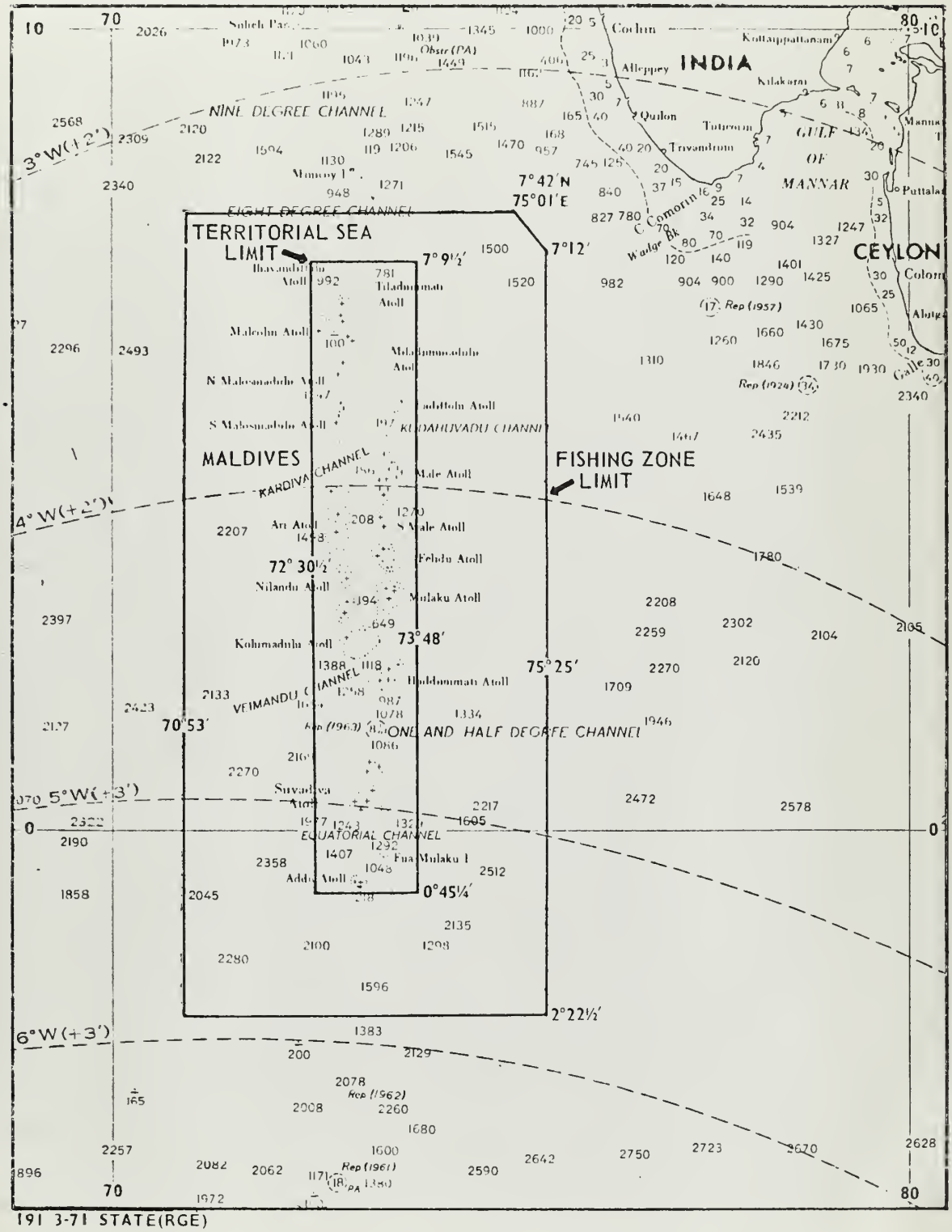
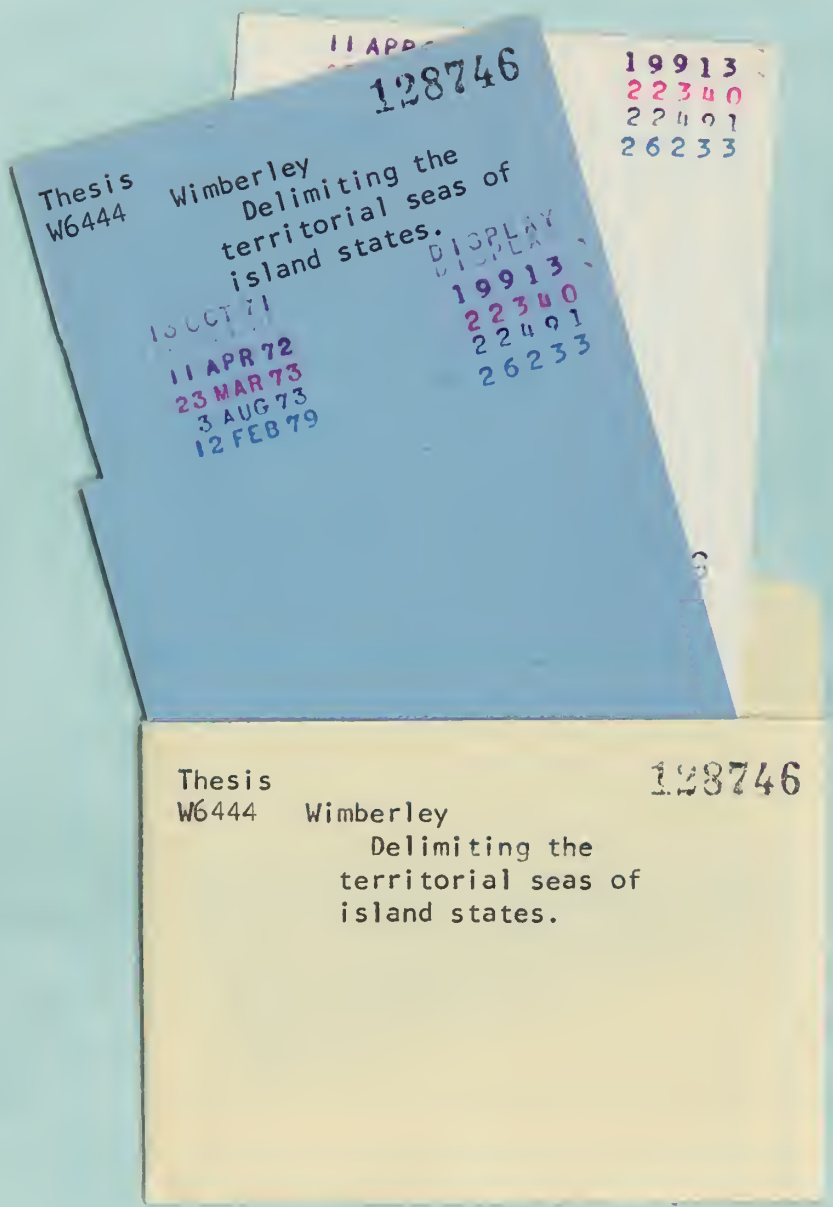
APPENDIX B

MALDIVES: Claimed Territorial Sea and Fishing Zone

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